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Ms Hajiera Salie
Parliamentary Portfolio Committee on Communications and Digital Technologies
Parliament
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16 January 2024

Dear Ms Salie

MMA, SOS COALITION AND SANEF: SUBMISSION ON THE SABC BILL

1. INTRODUCTION

1.1 The Parliamentary Portfolio Committee on Communications and Digital Technologies (the Committee) has called for public submissions on the SABC Bill 2023 (the Bill) as introduced in Parliament by the Department of Communications and Digital Technologies (the Department).

1.2 Media Monitoring Africa (MMA), the SOS Support Public Broadcasting Coalition (SOS) and the South African National Editors' Forum (SANEF) (collectively, the Organisations) thank the Committee for the opportunity to make these written submissions and request a further opportunity to make oral presentations. In this regard, the Organisations are of the respectful view that the matters traversed in the SABC Bill are so essential that oral hearings must be held and trust that Parliament will ensure that this is done in due course.

1.3 SOS is a civil society coalition that is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is our primary focus – as the key site of and the institution established to drive public interest broadcasting – SOS also engages in the advancement of community broadcast media in South Africa. SOS is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, scriptwriters, film makers, producers and directors).

1.4 SOS campaigns tirelessly for an independent and effective public broadcaster. We engage with policymakers, regulators, and lawmakers to secure changes that will promote citizen-friendly policy, legislative and regulatory changes to broadcasting and its associated sectors.

1.5 Media Monitoring Africa (MMA) is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.

1.6 MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical, and critical media culture. MMA has over 20 years' experience in media monitoring and direct engagement with media, civil society organisations and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.

1.7 The South African National Editors' Forum (SANEF) is a non-profit organisation whose members are editors, senior journalists, and journalism trainers from across South Africa. SANEF is committed to championing South Africa's hard-won freedom of expression and promoting quality, ethics, and diversity in the South African media. SANEF promotes excellence in journalism through, among others, supporting media freedom, preparing policy submissions and research, and engaging in education and training programmes. SANEF's mandate to protect and promote journalism includes advancing sustainability strategies for journalism.

1.8 SANEF has worked tirelessly to promote the freedom and sustainability of the press.

1.9 This submission also represents the views and needs of the film and television production sector's representative organisations.

2. OVERALL COMMENT: WE ARE NOT MOVING FORWARD

2.1 The Organisations are genuinely bewildered at much of the contents of the Bill.

2.2 The Bill is, in certain instances, effectively a restatement of the existing Broadcasting Act, 1999 (the Broadcasting Act) which is long past its sell-by date and which all parties agree is in dire need of a complete overhaul to ensure that the legal framework of the SABC is fit for purpose in the era of convergence. In particular, the Department itself has recognised the fundamental problems with the Broadcasting Act that must be addressed in its own Draft White Paper on Audio and Audio-Visual Content Services (the Draft White Paper), currently in its second iteration.

2.3 In this regard, the Organisations can only quote the Department itself[1]:

2.3.1 "***The SABC must be repurposed to be able to fulfil its mandate***" – at para 4.1.4 of the Draft White Paper;

2.3.2 "***The problem of the 'unfunded public mandate'…requires the creation for government…to fund information and content programming that is necessary in the public interest***" - at para 4.1.4 of the Draft White Paper;

2.3.3 "***The amendments to the legislation…must align to the judgment by Matojane J in SOS and Others v the SABC and Others***" - at para 4.2.1 of the Draft White Paper;

2.3.4 "***Provisions on…Financial Matters…require review and consequential amendments, including amendments to the TV Licence Fee section to broaden the definition and the collection system for television licence and to strengthen enforcement mechanisms and penalties for non-payment***" - at para 4.2.2.3 of the Draft White Paper;

2.3.5 "***The idea of a commercial division cross-subsidizing the public division has been a policy failure since inception…It has become impractical and expensive for the SABC to have separate books for the two divisions as it requires duplication of services to implement this legislative obligation***." - at para 4.2.4 of the first iteration of Draft White Paper;

[1] Where there is a need to distinguish between the wording of the first and second Draft White Papers we have specified which we are referring to. Otherwise the citations are correct for both the first and second Draft White Papers.

2.3.6 "***The legislative provisions dealing with the split of the Corporation's services into public and public commercial services should be removed and all of the current broadcasting licences held by the SABC should be converted into public broadcasting service licences***" – at para 4.2.5 of the first iteration of Draft White Paper;

2.3.7 "**The assumption [namely that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels] has proven to be incorrect as it has been the public services which have been more commercially successful**" – at para 4.2.4 of the second iteration of the Draft White Paper;

2.3.8 "***A strong and financially fit SABC is vital for South Africa and Government will take the necessary legislative and financial steps to ensure this***" – at para 4.3.1 of the Draft White Paper;

2.3.9 "***The public broadcaster should also have a mandate in legislation to operate international satellite television, radio and internet services***" – at para 4.3.4 of the Draft White Paper; and

2.3.10 "***The Draft White Paper proposes that there will be a comprehensive overhaul of the SABC's funding model based on international best practice to ensure that the public broadcaster has adequate funds to meet its public mandate***" – at para 4.3.5 of the Draft White Paper.

2.4 Each one of the above statements is an exciting, new, and laudable policy goal, and all of these have been advocated by SOS itself since its founding in 2007.

2.5 However, not one of the above policy statements of the Department is found in the SABC Bill. Instead, the SABC Bill is riddled with the kind of wording that the Department has already, in writing and as a matter of policy, disassociated itself with as is clear from the extracts of the Draft White Paper quoted above. This is inexplicable and unacceptable. The SABC Bill is, quite simply, not taking us forward and Parliament should, we respectfully submit, reject the SABC Bill and not proceed to enact it as it is, quite simply, at odds with the various iterations of the Draft White Paper.

2.6 Further, the organisations are deeply concerned at the move to introduce the SABC Bill in Parliament before the finalisation of the Draft White Paper.

2.7 The Draft White Paper is a policy document that outlines government's proposed framework for the regulation of audio and audio-visual media services. It is important to note that the second Draft White Paper contains provisions that significantly impact the proposed structure and funding of the SABC.

2.8 Consequently, it is clear that the SABC Bill is being rushed through Parliament in a policy vacuum given the many u-turns and other changes of policy proposals relevant to the SABC, including with regard to its structures and funding sources which are reflected in the Second Draft White Paper, and the entire public interest broadcasting/online services model appears to be in a great state of flux.

2.9 Further this iteration of the SABC Bill is very different from the Draft SABC Bill published for public notice and comment in July 2021 and is not in accordance with any of the comments received by the Department on the first iteration of the Draft SABC Bill, so it is unclear where the proposals are in fact coming from.

2.10 Parliament is thus being presented with a Bill that is very much at odds with the provisions of the previous iteration of the Draft Bill and in respect of which new proposals, the public was not given a chance to comment by the Department before introducing the Bill in Parliament. Further the Bill is at odds with the substantive policy statements contained in the second Draft White Paper and which are themselves, in some instances, at odds which the substantive policy statements contained in the first Draft White Paper which had garnered widespread public support.

2.11 The Organisations submit that it cannot be correct law-making process that national policy is not close to being finalised and yet a Bill (which will pave the way for the next two decades (at least) of the SABC's existence) is rushed to Parliament without the public having even had sight of its new controversial provisions. The version of the SABC Bill that was sent to Cabinet for approval was not subject to a prior public notice and comment process. There is a huge risk in bypassing valuable input from stakeholders and members of the public. Meaningful public participation is fundamental to our democracy and ensures that policies and laws reflect the diverse interests of the public. The Organisations are particularly concerned with ensuring that the public interest is central to the development of policy and law when it comes to the public broadcaster, precisely because of the crucial information providing role that the SABC plays in the life of the nation.

2.12 As it is, public comment on the previous iteration of the Draft Bill (2021) was hostile to the Department attempting to pass a bill in a policy vacuum. The provisions of the current SABC Bill are much more controversial. The bottom line is that Parliament must recognise that it is critical that the policy document, the Draft White Paper, be finalised before the SABC Bill or any iteration thereof can be passed by Parliament.

2.13 This is particularly the case when the SABC Bill introduces controversial and drastic changes that threaten public broadcasting as we know it and that undermine and are contrary to prominent court judgements that specifically require protection of the independence of the public broadcaster from Ministerial and other political interference. We highlight here the absence of concrete proposals regarding the funding of the SABC, the undermining of the governance structure of the SABC and all of the proposals regarding the proposed

commercial subsidiary which are at odds with the Department's own acknowledgements of the myriad failures of the public/public commercial model since inception in 1999.

3. SOS'S DRAFT ALTERNATIVE SABC AND CONSTITUTIONAL AMENDMENT BILLS

3.1 In response to the first iteration of the SABC Bill distributed by the Department, SOS took the trouble to draft an alternative SABC Bill to take account of various applicable court rulings, the first iteration of the Draft White Paper and the public submissions made thereon around which a number of consensus positions appeared to have been reached.

3.2 Given the provisions of the Second Draft White Paper, it is clear that the Department has gone back on its draft policy around which consensus had largely been achieved and so too many issues remain unresolved from a policy point of view for any SABC Bill to be usefully passed at this stage. Hence, we do not attach the latest drafts of our proposed Bills but we would obviously provide these to the Committee upon request if the Committee would find this helpful.

4. THE UNCONSTITUTIONALITY OF THE PROCESS

4.1 SOS, MMA and SANEF value transparency and participation in legislation-making particularly concerning an institution that is fundamental to our democracy such as the SABC. Given the vital role the SABC plays in society, proposed structural, funding, governance and operational changes require detailed public scrutiny by stakeholders, experts, civil society and members of the public. To date, the Department has deprived the public of an opportunity to comment on the implications of the never-before-seen changes contained in the SABC Bill (as differentiated from the 2021 SABC Bill) and this is an infringement of the public's right to fully participate in democratic processes.

4.2 Parliament has experience of being on the losing side of these kinds of constitutional process issues. In *Mogale and Others v Speaker of the National Assembly and Others*[2]*, the Constitutional Court* set a precedent in these matters. As is already clear from civil society formations which have commented on the Second Draft White Paper, the Department has ridden roughshod over objections to certain policy proposals and over support for others which have simply been now abandoned by the Department with no justification for its policy u-turns.

4.3 If Parliament proceeds to try to deal with the SABC Bill knowing full well that the policy is not yet even set out in properly formulated proposals, much less actually finalised and adopted,

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[2] *Constance Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22).

it will be complicit in unconstitutional conduct and again, opens itself up to successful legal challenges of the kind exemplified in the *Mogale* case.

4.4 For all of the aforementioned reasons, the Organisations do not intend to canvass each and every aspect of the Bill as it is of the view that the Bill must be withdrawn or rejected by Parliament at this stage. Nevertheless, the Organisations set out below their objections to key aspects of the Bill that they believe constitute flaws of so serious a nature so as to render the passage of the Bill, as is, at odds with existing laws, particularly the Electronic Communications Act, 2005 (the ECA) and, of course, with the Constitution of the Republic of South Africa, 1996 (the Constitution).

5. AD PREAMBLE OF THE BILL

5.1 The Organisations submit that the preamble is problematic because:

5.1.1 it does not sufficiently set out the roles that are required to be played by the state as sole shareholder *on behalf of the public* and the Minister as *public representative* with regard to the SABC; and

5.1.2 it misstates what services the SABC is currently licenced to provide; stating that it is licensed to provide "public broadcasting audio and audio-visual content services". This is of course, factually incorrect, as the SABC is licensed to provide only public broadcasting: sound and television services. There is no category of audio or audio-visual content services in our law and indeed, as the Committee will doubtless know, ICASA is expressly prohibited from licensing content services at this time as these are excluded from the definitions of both "broadcasting" and "electronic communication" in terms of the Electronic Communications Act, 2005 (the ECA).

6. AD SECTION 2: INTERPRETATION OF ACT

The Organisations note that the Bill is silent on conflicts between it and the Public Finance Management Act, 1999 (PFMA) and/or the Preferential Procurement Policy Framework Act, 2000 (PPPFA) and note that this issue must be dealt with in any SABC-related legislation given the difficulties experienced by the SABC with regard to monetising commissioned content or entering into joint ventures with content producers due to the strictures of the PFMA and the PPPFA.

7. AD SECTION 3: OBJECT OF ACT

7.1 The Organisations have long criticized the Broadcasting Act for not clearly stipulating which provisions thereof constitute the actual public mandate of the SABC.

7.2 The Organisations submit that these are spread throughout the Act and, sadly, the Bill makes the same fundamental error. The Organisations submit that public mandate issues can be found in sections: 3, 7, 8, 10, and 24 of the Bill.

7.3 In order to properly clarify the distinction between the Object of the Act, the Public Mandate of the SABC and Powers of the Corporation, these are required to be delineated properly and this is not done in the SABC Bill.

8. AD SECTION 4: CONTINUED EXISTENCE OF CORPORATION

8.1 The Organisations submit that section 4 of the Bill does not sufficiently set out the roles that are required to be played by the state as sole shareholder *on behalf of the public* and the Minister as *public representative* with regard to the SABC.

8.2 This is essential in light of the judgment *by* Matojane J in *SOS and Others v the SABC and Others*[3].

9. AD SECTIONS 5 AND 39: FUNDING OF THE CORPORATION AND THE TELEVISON LICENCE FEE

9.1 The SABC is in a financial crisis and recently reported a loss of R1.1 billion and thus it needs a funding model that will ensure its sustainability.

9.2 Yet both the SABC Bill and the Draft White Paper processes reflect confusion at the level of the Department with regard to its thinking on the appropriate funding model of the SABC and it would be reckless of Parliament to proceed to enact the SABC Bill without a proper funding model in place for the SABC.

9.3 The bottom line, the Organisations submit, is that if the funding model put forward in the SABC Bill is unworkable, Parliament must reject the Bill and insist that it is withdrawn and reworked or else the SABC Bill will signal the financial collapse of the SABC which has already been contemplating applying for business rescue as has been widely reported in the press[4].

9.4 SOS and MMA submit, as we have argued in the Daily Maverick, that:

The most cynical aspect of the SABC Bill is its refusal to grasp the nettle of the financial hole facing the SABC because of its unfunded public mandate.

It is this that industry watchers have been asking for, for years. Billions in short term bail outs, even when managed by an excellent Board and management team (as has been the case for the last five years), cannot hide the fact that the public broadcasting model of no public funding in the face of an onerous public mandate is unsustainable and has been broken beyond repair for decades.

[3] https://www.saflii.org/za/cases/ZAGPJHC/2017/289.html.

[4] See for example https://businesstech.co.za/news/government/702697/sabc-on-the-edge-of-collapse-report/.

The SABC Bill provides that the Minister must develop a funding model framework to ensure that the majority of the SABC's funding is sourced from state-based funding models but he is only required to do that within three years of the Bill coming into force!

9.5 It is critical to follow the quixotic policy pronouncements of the Department in relation to funding the SABC:

9.5.1 In the first iteration of the Draft White Paper, as we have set out above, the Department stated as a matter of policy that:

9.5.1.1 "***The idea of a commercial division cross-subsidizing the public division has been a policy failure since inception…It has become impractical and expensive for the SABC to have separate books for the two divisions as it requires duplication of services to implement this legislative obligation***." – at para 4.2.4 of the first iteration of Draft White Paper; and

9.5.1.2 "***The legislative provisions dealing with the split of the Corporation's services into public and public commercial services should be removed and all of the current broadcasting licences held by the SABC should be converted into public broadcasting service licences***" – at para 4.2.5 of the first iteration of Draft White Paper.

9.5.2 Indeed, even in the second iteration of the Draft White Paper, the Department stated as a matter of policy that: "**The assumption [namely that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels] has proven to be incorrect as it has been the public services which have been more commercially successful**" – at para 4.2.4 of the second iteration of the Draft White Paper.

9.5.3 Both iterations of the Draft White Paper have clearly recognised the depth of the funding crisis which has beset the SABC for decades now:

9.5.3.1 "***A strong and financially fit SABC is vital for South Africa and Government will take the necessary legislative and financial steps to ensure this***" – at para 4.3.1 of the Draft White Paper;

9.5.3.2 "***The Draft White Paper proposes that there will be a comprehensive overhaul of the SABC's funding model based on international best practice to ensure that the public broadcaster has adequate funds to meet its public mandate***" – at para 4.3.5 of the Draft White Paper;

9.5.3.3 "***The problem of the 'unfunded public mandate'…requires the creation for government…to fund information and content programming that is necessary in the public interest***" – at para 4.1.4 of the Draft White Paper and

9.5.3.4 "***Provisions on…Financial Matters…require review and consequential amendments, including amendments to the TV Licence Fee section to broaden the definition and the collection system for television licence and to strengthen enforcement mechanisms and penalties for non-payment***" – at para 4.2.2.3 of the Draft White Paper.

9.6 Further, the governing party's (the African National Congress) own recent policies specifically refer to the SABC needing to be a *"**fiscus-funded public broadcaster**"*[5]. And yet the second Draft White Paper and indeed the SABC Billl itself now contains provisions entirely at odds with the above. In this regard:

9.6.1 Cross-subsidisation:

9.6.1.1 The second Draft White Paper states that *"the public commercial division of the SABC will have a new Commercial Board and will be solely purposed to generate revenue to sustain the SABC and continue to fund the public service mandate of the SABC"*[6] *(our emphasis). However this is contained under a heading "Summary of Key Draft Policy Proposals"* but this is not a summary as this policy proposal is not contained anywhere (our emphasis) in the actual substantive text of the second Draft White Paper which substantive provisions abandon the cross-subsidisation model.

9.6.1.2 Section 24(2)(d) of the SABC Bill specifically reiterates and restates the supposedly abandoned cross-subsidisation model namely: **"The responsibility of the Commercial Company is to ensure that the commercial audio and audiovisual content media services provided by the [sic] on behalf of the corporation must subsidise the public audio and audiovisual media content services to the extent recommended by the Commercial Board and approved by the Corporation."** However there are glaring problems with this provision, including that the discretion to cross-subsidise appears to be open-ended and it is not clear what happens if:

9.6.1.2.1 the Commercial Company (that is, the proposed subsidiary company) fails to recommend any subsidisation level for public audio and audiovisual content as is likely given the Department's own admission that it has **been**

[5] African National Congress 5th National Policy Conference Report (2022) at p 51.
[6] Second Draft White Paper p 102.

the public services which have been more commercially successful" – at para 4.2.4 of the second iteration of the Draft White Paper; and/or

9.6.1.2.2 the SABC fails to approve the cross-subsidisation proposals of the Commercial (subsidiary) company.

9.6.1.3 Consequently, it is clear that the cross-subsidisation model has been a proven failure for nearly a quarter of a century now and the rehashing of the model (contrary to many of the actual policy statements in the second Draft White Paper) is doomed to failure not least because it is inconceivable that the Commercial company would be in a position to cross-subsidise in any event and the respective powers of the Commercial company and the SABC with regard to actual decision-making regarding cross-subsidisation are entirely opaque and are not clarified, or indeed even set out, in section 24 of the SABC Bill.

9.7 <u>The Television Licence Fee</u>

9.7.1 We reiterate that the Draft White Paper states:

9.7.1.1 ***"There will be a comprehensive overhaul of the SABC's funding model based on international best practice to ensure that the public broadcaster has adequate funds to meet its public mandate***" – at para 4.3.5 of the Draft White Paper; and

9.7.1.2 "***Provisions on…Financial Matters…require review and consequential amendments, including amendments to the TV Licence Fee section to broaden the definition and the collection system for television licence and to strengthen enforcement mechanisms and penalties for non-payment***" – at para 4.2.2.3 of the Draft White Paper.

9.7.2 And yet the SABC Bill proposes, at section 39, to keep the <u>identical</u> (our emphasis) wording of the Television Licence provision currently existing in section 27 of the Broadcasting Act which provision has been universally recognised to have been a significant failure in terms of effective funding of the SABC for the past quarter of a century!

9.7.3 The effect of the above is that the SABC Bill fails to do <u>any</u> (our emphasis) of the four policy proposals contained in the Draft White Paper, that is, it <u>fails</u> (our emphasis) to:

9.7.3.1 broaden the definition of "television licence";

9.7.3.2 broaden the collection system;

9.7.3.3 strengthen the collection system; and

9.7.3.4 strengthen the penalties for non-payment.

9.7.4 The Organisations submit that Parliament, as an oversight body, would be failing in its fundamental obligations and duties if it passed into law television licence provisions knowing that they have failed in the past and are doomed to failure now, particularly when the draft policy clearly specifies what kinds of amendments need to be made going forward but these are not provided for in the SABC Bill. This further demonstrates the need for the policy document (Draft White Paper) to be finalised before passing the SABC Bill so as to avoid discrepancies of this nature.

9.8 PFMA and PPPFA Amendments – Impacts on SABC Funding:

9.8.1 At p 102 of the second Draft White Paper the Department reiterates that the Cultural and Creative Industries Master Plan has proposed amendments to the PFMA and PPPFA to deal with procurement and commissioning of content by the SABC.

9.8.2 And yet the PFMA and PPFA are not mentioned in the SABC Bill and certainly no amendments to these pieces of legislation are contained in the Schedule (Repeal and Amendment of Laws) to the Bill.

9.8.3 The Organisations submit that this is another example where policy proposals are ignored by the drafters of the Bill despite being clearly referred to in the Draft White Paper.

9.9 Subscription Funding:

9.9.1 The SABC Bill states the SABC is funded from, *inter alia*, "**any money received by way of subscription**" – section 5(1)(b).

9.9.2 The Organisations are extremely concerned at this language as it envisages a "pay for content" model akin to that applicable to commercial subscription broadcasting services.

9.9.3 The Organisations submit that no model of public service content provision can be based on a subscription model which would mean the provision of services only to those able to afford them.

9.9.4 The Organisations submit that the concept of subscription content provision is antithetical to principles of universal access and service in respect of public content services, including but not limited to, broadcasting and would be entirely at odds with the public mandate of the SABC.

9.9.5 Further, this would be entirely at odds with numerous policy statements in the Draft White Paper, for example:

9.9.5.1 the distinction made between public and commercial free to air and subscription broadcasting – at pages 57 and 85;

9.9.5.2 the rationale for must carry regulations – as discussed at pages 111 and 112;

9.9.5.3 the rationale for public broadcaster having access to national sporting events - as discussed at page 118; and

9.9.5.4 the proposal of advertising caps on subscription broadcasters – as discussed at page 130.

9.9.6 As a result, the Organisations submit that Parliament must reject subscription revenue as a form of funding the SABC which would entail rejecting the wording of section 5(1)(b) of the SABC Bill.

9.10 Funding the Public Mandate:

9.10.1 The Draft White Paper makes repeated reference for the need for Government to take steps to ensure the financial viability of the SABC, including, direct public funding of the SABC to ensure that it is able to carry out its public mandate:

9.10.1.1 "***A strong and financially fit SABC is vital for South Africa and Government will take the necessary legislative and financial steps to ensure this***" – at para 4.3.1 of the Draft White Paper;

9.10.1.2 "***The Draft White Paper proposes that there will be a comprehensive overhaul of the SABC's funding model based on international best practice to ensure that the public broadcaster has adequate funds to meet its public mandate***" – at para 4.3.5 of the Draft White Paper; and

9.10.1.3 "***The problem of the 'unfunded public mandate'…requires the creation for government…to fund information and content programming that is necessary in the public interest***" – at para 4.1.4 of the Draft White Paper.

9.10.2 The Second Draft White Paper however does not provide the promised research on international best practice on public broadcasting funding models and certainly the SABC Bill has failed to provide same.

9.10.3 This is perhaps not surprising given that the SABC Bill entirely sidesteps the critical issue of direct fiscus-based funding (currently at 3% of the SABC's income according to its various Annual Reports).

9.10.4 Instead, section 5(2) of the SABC Bill, in an extraordinary provision for a would-be statute having the force of law, again delays the development of, let alone the actual legal implementation of, a proper fiscus-funded model of public funds for the unfunded public mandate of the SABC which is responsible for the dire financial state of the SABC. Instead it promises only that within three years the Minister must develop a funding model "framework" – note not (our emphasis) an actual funding model - to ensure that a majority of the SABC's funding is sourced from State-based funding mechanisms.

9.10.5 The effect of this is that, as a result of the SABC Bill, the SABC will be no nearer to solving the unfunded public mandate crisis that besets it now. Further, the Department has not bothered to undertake the best practise research or the relevant feasibility studies which would underpin any proposed public model framework even although its public policy process has been underway for over thirteen years!

9.10.6 The Organisations are of the view that the admission by the Department that neither the best practise research nor the relevant feasibility studies have been undertaken to date must bring into question the value of the entire White Paper process let alone the SABC Bill itself. Indeed, the question has to be begged: how does a government finalise a policy development process in which the crucial issue to be determined as a matter of policy is a new funding model for a public broadcaster which is manifestly financially unsustainable without undertaking any comparative research or feasibility studies?

9.10.7 The bottom line is that it cannot. Parliament, as the oversight body, must insist that these be undertaken before:

9.10.7.1 the Draft White Paper; or

9.10.7.2 the SABC Bill,

can be finalised and, in the latter's case, brought into law.

9.10.8 Consequently, the Organisations submit that Parliament must reject the wording of section 5(2) of the SABC Bill.

9.11 As a result of all of the submissions above, the Organisations respectfully submit that Parliament must refuse to enact section 5 of the SABC Bill into law. Given that section 5 "Funding" of the Bill is central to the whole purpose of the Bill and is central to the continuing operations of the SABC, the Organisations respectfully submit that Parliament must reject the entirety of the SABC Bill as a result of the prematurity and unworkability of the provisions of section 5, among many others.

10. AD SECTION 6: ROLE OF THE MINISTER

10.1 The Organisations submit that almost the entirety of section 6 of the Draft Bill is *ultra vires* in respect of the appropriate powers of the Minister, as per the judgment of Matojane J in the *SOS* Case[7].

10.2 The attempt made in sub-section 6(2) of the SABC Bill to give a practically unbounded discretion to the Minister to dictate additional functions of the Corporation beyond those found in other provisions of the SABC Bill is not constitutional as it effectively arrogates to

[7] At para [122].

the Minister legislative powers which properly belong to Parliament. It is for Parliament to determine, as a matter of statute, what the functions of the SABC are to be.

10.3 The power of the Minister to direct the SABC provided for in sub-sections 6(3) and (4) of the SABC Bill is not consistent with an independent public broadcaster as has been clearly articulated by Matojane J in the *SOS* Case.

10.4 The Minister cannot remove any member of the SABC Board or any of its subsidiaries for any reason whatsoever (see sub-section 6(5) of the SABC Bill), as that role is properly reserved for Parliament acting together with the President in order to secure the independence of the SABC as has been clearly articulated by Matojane J in the *SOS* Case and as is provided for in section 14 of the SABC Bill itself.

10.5 Further, it is appropriate that the National Assembly, as the appropriate oversight body, and not the Minister, be empowered to direct the Corporation to take action in the event of financial difficulty, contrary to the provisions of section 6(6).

10.6 Consequently, the Organisations are of the view that none of subsections 6(2) to (6) of the SABC Bill are in accordance with the High Court's pronouncements on the legal requirements in respect of the independence of the SABC *vis a vis* the Minister as articulated in the *SOS* case. Consequently, the Organisations respectfully submit that Parliament must refuse to enact section 6 of the SABC Bill into law.

11. AD SECTIONS 7 AND 8: CHARTER AND OBJECTIVES OF THE CORPORATION

11.1 The Organisations have long criticized the Broadcasting Act for not clearly stipulating which provisions thereof constitute the actual public mandate of the SABC.

11.2 The Organisations submit that these are spread throughout the Act and, sadly, the Bill makes the same fundamental error. The Organisations submit that public mandate issues can be found in sections: 3, 7, 8, 10, and 24 of the Bill and are essentially repetitious of the existing provisions in the Broadcasting Act.

11.3 In order to properly clarify the distinction between the Object of the Act, the Public Mandate of the SABC and Powers of the Corporation, these are required to be delineated properly and this is not done in the SABC Bill.

11.4 Further, while noting that certain provisions of the Cabinet-approved version of the Bill do try to take account of technological convergence, sadly these provisions are poorly drafted with numerous grammatical and or typographical errors, including:

11.4.1 "***The objectives of the corporation are to make audio- and audiovisual content media services sound and television broadcasting services [sic] available throughout the Republic –*** at section 8(a) of the SABC Bill; and

11.4.2 "***to provide audio and audiovisual content media programmes [sic] of national identify, information, education entertainment [sic] and reflect the cultural diversity and pluralism of the Republic –*** at section 8(b) of the SABC Bill.

11.5 The Organisations submit that the drafting is symptomatic of a rush to get the SABC Bill through Parliament even though it is clearly not fit for purpose. Consequently the Organisations submit that Parliament ought to reject the Bill.

12. AD SECTIONS 9 TO 11: ORGANISATION, PUBLIC SERVICES AND COMMERCIAL SERVICES

12.1 The Organisations are disappointed that the Department saw fit to rehash these provisions from the Broadcasting Act almost word for word, substituting the term "operational services" for "divisions" in the original Broadcasting Act.

12.2 This is particularly troubling given the Department's own view of the failures of the attempted division of the SABC's services into public and public commercial, which have never been actualised in practice, namely:

12.2.1 "***The idea of a commercial division cross-subsidizing the public division has been a policy failure since inception…It has become impractical and expensive for the SABC to have separate books for the two divisions as it requires duplication of services to implement this legislative obligation***." – at para 4.2.4 of the first Draft White Paper;

12.2.2 "***The legislative provisions dealing with the split of the Corporation's services into public and public commercial services should be removed and all of the current broadcasting licences held by the SABC should be converted into public broadcasting service licences***" – at para 4.2.5 of the first Draft White Paper; and

12.2.3 Indeed, even in the second Draft White Paper, the Department stated as a matter of policy that: **"The assumption [namely that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels] has proven to be incorrect as it has been the public services which have been more commercially successful"** – at para 4.2.4 of the second iteration of the Draft White Paper.

12.3 The Organisations agree with the policy statements by the Department in its own Draft White Paper iterations set out above.

12.4 Consequently they are at a loss to understand how something which has failed to work for a quarter of a century has found its way into the SABC Bill which is intended to overhaul and rescue the ailing public broadcaster and the Organisations suggest that Parliament needs

to satisfy itself that it is not engaging in law-making designed to fail by passing this Bill into law without interrogating how continuing along the same trajectory could not but yield the same results.

12.5 Further and in any event, the provisions of section 9 envisage that the SABC itself will provide two separate operational services which is at odds with section 11 which states that a different (albeit a subsidiary) company is to provide the public commercial services. Given this internal inconsistency and contradiction, the SABC Bill ought not to be passed as is.

13. AD SECTIONS 12 AND 13: COMPOSITION AND APPOINTMENT OF THE BOARD

13.1 The Organisations are strongly of the view that the Chief Operating Officer's position is essential to the operations of the SABC and that the team of three executive directors must remain in place for the proper operational management of the SABC. The reasons for this are based on the complexity and sheer size of the organisation – it is simply too great an executive burden to be placed on the shoulders of a single person or two people. The executive directors are responsible for the implementation of the Board's strategic directions and requirements and it is essential that three executive directors be in place to ensure that this is done properly.

13.2 The Organisations note that many of the provisions of section 13 remain as worded in the Broadcasting Act. The Organisations are disappointed with this because the SABC Bill ought to contain:

13.2.1 additional provisions to improve public participation and transparency in the non-executive Board members' appointments process, including through expanded nominations and shortlisting provisions;

13.2.2 additional provisions to guard against political appointments (as opposed to public interest appointments) being made during in the non-executive Board members' appointments process, including through expanded nominations and shortlisting provisions, for example, by the requiring of reasons for recommendations by the National Assembly; and

13.2.3 expanded criteria for appointments of non-executive Board members' appointments to ensure the appointment of people who represent important social constituencies and who are committed to the Public Mandate of the SABC.

13.3 One of the significant amendments contained in section 13 of the SABC Bill is section 13(2)(c) which requires obtaining a security clearance. The Organisations are strongly against this inclusion in the SABC Bill because it delays appointment processes as we saw to the very great cost to the SABC in 2022 and, more importantly, because it is unnecessary

and “securocratic”, the antithesis of the principles of open public service media. In this regard:

13.3.1 National Strategic Intelligence Act (NSIA) and the Critical Infrastructure Protection Act (CIPA)

13.3.1.1 Section 2A(1) of the NSIA empowers (but does not require) the members of the National Intelligence Structures (which includes the SSA) to conduct a vetting investigation in the prescribed manner to determine the security competence of a person if the person is, inter-alia, (a) an applicant to an organ of state or (b)(ii) has given notice of intention to render a service to an organ of state which service may… give him or her access to areas designated national key points. The SABC is a national key point.

13.3.1.2 The Critical Infrastructure Protection Act, 2019 (CIPA) repealed and replaced the National Key Points Act. And it provides, at section 30(1), that any National Key Point declared under, *inter alia*, the National Key Points Act must be deemed to be critical infrastructure until the Minister has decided whether or not to declare such National Key Point as critical infrastructure in terms of section 20(1) of the CIPA.

13.3.1.3 CIPA does indeed deal with vetting of personnel at a National Key Point, such as the SABC. However, as section 30(3) of the CIPA makes clear, such vetting is required only in respect of “any security service provider (our emphasis), including any security officer employed at the critical infrastructure”. There is no general obligation to vet non-security personnel at a National Key Points including non-executive members of the board of such National Key Point.

13.3.1.4 The mere fact that the SABC is designated a National Key Point or Critical Infrastructure in terms of CIPA does not mean that its non-executive Board members are required to be subject to vetting.

13.3.2 Minimum Information Security Standards (MISS) enacted in terms of NSIA

13.3.2.1 The preface to the MISS states that it was compiled as an official government policy document on information security, which must be maintained by all institutions who handle sensitive/classified material of the Republic (our emphasis).

13.3.2.2 It is clear the SABC, as the public broadcaster, does not handle sensitive or classified material and indeed, its reason for existence is to disseminate news and information to the entire population of the Republic.

13.3.2.3 Chapter 5 of the MISS contains Guidelines with Respect to Security Vetting of Personnel. In this regard:

13.3.2.3.1 Section 1.1 of Chapter 5 provides that security vetting is the "systematic process of investigation followed in determining a person's security competence" (our emphasis).

13.3.2.3.2 Section 1.2 of Chapter 5 provides, *inter alia*, that the degree of security clearance given to a person "is determined by the content of and/or access to classified information (our emphasis) entailed by the post… to be occupied by the person".

13.3.2.3.3 Section 1.5 of Chapter 5 specifies that "political appointees" "will not be vetted, unless the President so requests or the relevant contract so provides". We are of the view that non-executive members of the SABC board are inherently "political appointees" as appointments are made by the President on the recommendation of the National Assembly. Further, we have been unable to obtain any evidence that the President has requested the vetting of the shortlisted candidates for non-executive SABC board positions.

13.3.2.3.4 Consequently, it is our view that Chapter 5 of the MISS makes it clear that the Guidelines implicitly exempt shortlisted candidates for non-executive SABC board positions from being vetted under the MISS and/or the National Strategic Intelligence Act.

13.3.2.3.5 In our view, it is clear that chapter 5 of the MISS is not applicable to board members of the SABC as the SABC is not an institution which deals in classified information, indeed the opposite is the case, it deals in information to be broadcast to the public.

13.3.3 Consequently, we are of the view that there is no legal basis for the proposed amendment to require security vetting of nominated candidates to the public broadcaster as a qualification criterion for appointment when the actual state security legislation and regulations do not require same.

14. AD SECTION 15: RESOLUTION FOR REMOVAL OF MEMBER, DISSOLUTION OF BOARD AND APPOINTMENT OF INTERIM BOARD

14.1 The Organisations have long criticised the amendments made to the Broadcasting Act in 2010 which introduced the practice of removing the whole Board of Directors of the SABC and replacing it with an Interim Board. This then happened twice in less than a decade.

14.2 The invitation to political interference is obvious.

14.3 The Organisations are of the view that should an individual non-executive Board member be unfit, unwilling or unable to perform his or her Board functions effectively, Parliament and the President must be able to remove her or him, but this cannot morph into an ability for the National Assembly and the President to collapse a Board and replace it with an Interim Board because of the instability of the institution that results.

14.4 Consequently, the Organisations are of the view that section 15(2) to (7) must be deleted from the Bill.

15. AD SECTOIN 17: EXECUTIVE COMMITTEE

The Organisations reiterate that they are strongly of the view that the Chief Operating Officer's position is essential to the operations of the SABC and that the team of three executive directors must remain in place as part of the Executive Committee (and be the three responsible for the appointment of other senior management members of the Executive Committee in terms of subsection 17(2)) for the proper operational management of the SABC).

16. AD SECTION 18: CONDITIONS OF APPOINTMENT OF GROUP CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER

16.1 The Organisations reiterate that they are strongly of the view that the Chief Operating Officer's position is essential to the operations of the SABC and that the team of three executive directors must remain in place for the proper operational management of the SABC.

16.2 There are other serious concerns regarding the provisions of section 18(2). In particular, the Organisations are alarmed at the statement that the Editor in Chief of the SABC shall be the CEO – contained in subsection 18(2) of the SABC Bill. In this regard:

16.2.1 The SABC has suffered greatly in the past from political and other interference in editorial matters.

16.2.2 Indeed Parliament's own **FINAL REPORT OF THE AD HOC COMMITTEE ON THE SABC BOARD INQUIRY INTO THE FITNESS OF THE SABC BOARD, DATED 24 FEBRUARY 2017**[8] made the following findings and in-principle statement on the issue:

[8] https://pmg.org.za/tabled-committee-report/2898/

"It is a basic principle in many news organisations worldwide that editorial decisions should to be made by news editors, and not management, in order to insulate news decisions from any commercial or political considerations[9]."

16.2.3 Upward referral of news-related decisions to executive management as opposed to the News Editor and the appointment of the CEO as Editor in Chief instead of the News Editor was specifically panned by Parliament just half a decade ago[10].

16.2.4 Immediately after the release of the above Report, the SABC Board, obviously correctly, set about changing this anomalous position and the latest set of SABC Editorial Policies[11] provides that the Group Executive: News and Current Affairs is the Editor in Chief of the SABC[12].

16.2.5 It is therefore inconceivable that Parliament would wish to set the SABC back to the days of state capture so excoriated by then Chief Justice Zondo during the so-called Zondo Commission but requiring, as a matter of statute, that editorial independence of the public broadcaster be undermined by requiring that the CEO is the Editor in Chief instead of the Group Executive: News and Current Affairs as Parliament itself had recommended and as has been implemented by the SABC Board.

16.2.6 To do so be contrary to South Africa's adherence to the Declaration of Principles on Freedom of Expression and Access to Information in Africa enacted by the African Commission on Human and Peoples' Rights (2019), principle XIII "Public Service Media", which specifically provides that "The editorial independence of public service media shall be guaranteed." Having the CEO as Editor in Chief does the opposite.

16.2.7 Consequently the Organisations are of the view that section 18 is yet another reason why the SABC Bill should be rejected by Parliament which should require the Department to withdraw it at this time.

17. AD SECTION 19: CONDITIONS OF APPOINTMENT OF THE CEO AND CFO

17.1 The Organisations reiterate that the position of the COO should be included in this section.

17.2 Further, the Organisations are alarmed at the restrictions imposed on the Board regarding:

17.2.1 the length of contract/employment that the Group Chief Executive Officer and the Group Chief Financial Officer in section 19(2) of the Bill; and

[9] At para 10.2.2 of the Report.
[10] Ibid.
[11] https://www.sabc.co.za/sabc/wp-content/uploads/2020/07/Editorial-Policy-Book.pdf
[12] At para 3.1.3.

17.2.2 the remuneration of the Group Chief Executive Officer and the Group Chief Financial Officer in section 19(4) of the Bill.

17.3 The Organisations are of the view that the requirement for a limited term of employment (albeit subject to a single period of re-appointment) of the CEO and CFO is not appropriate and that the Board/s of the SABC should, as those accountable to the public (through Parliament) for the performance of the SABC, be responsible for making decisions on the contractual arrangement between the Corporation and its Executive Directors.

17.4 Secondly, the Organisations submit that the kind of Ministerial interference envisaged in section 19(4) is not in accordance with the requirements set out in the *SOS Case* regarding the need for the Board to control the affairs of the SABC. This kind of interference in Board decisions has already been found to have been unlawful in respect of the SABC by the High Court.

17.5 Consequently the Organisations submit that this is a further reason for Parliament to reject the SABC Bill.

18. AD SECTION 20, 21 AND 22: TERMINATION OF EMPLOYMENT OF APPOINTMENT OF CEO and CFO, ACTING CEO AND CFO AND DELEGATION BY CEO AND CFO

18.1 The Organisations reiterate that it is strongly of the view that the Chief Operating Officer's position is essential to the operations of the SABC and that the team of three executive directors must remain in place for the proper operational management of the SABC.

18.2 Further, the Organisations are concerned that a notice period of only 30 days (provided for in subsection 20(4)) will not be conducive to the smooth operations of the SABC.

19. CHAPTERS 5-7: THE COMMERCIAL CORPORATION

19.1 The Organisations express, in the strongest possible terms, their concerns regarding the provisions of Chapters 5-7 of the SABC Bill.

19.2 Effectively, these chapters establish a subsidiary corporation to the SABC to operate the public commercial services of the SABC which services must "subsidise the public audio and audiovisual media content services" in terms of section 24(2)(d) of the SABC Bill.

19.3 The Organizations reiterate that the Draft White Paper's substantive policy statements clearly reflect the Department's own view of the failures of the attempted division of the SABC's services into public and public commercial, which have never been actualised in practice, namely:

19.3.1 "***The idea of a commercial division cross-subsidizing the public division has been a policy failure since inception…It has become impractical and expensive***

for the SABC to have separate books for the two divisions as it requires duplication of services to implement this legislative obligation." – at para 4.2.4 of the first Draft White Paper;

19.3.2 "***The legislative provisions dealing with the split of the Corporation's services into public and public commercial services should be removed and all of the current broadcasting licences held by the SABC should be converted into public broadcasting service licences***" – at para 4.2.5 of the first Draft White Paper; and

19.3.3 Indeed, even in the second Draft White Paper, the Department stated as a matter of policy that: **"The assumption [namely that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels] has proven to be incorrect as it has been the public services which have been more commercially successful**" – at para 4.2.4 of the second iteration of the Draft White Paper.

19.4 As noted previously in this submission, the Organisations agree with the policy statements by the Department in its own Draft White Paper iterations set out above. The Organisations note that the second Draft White Paper does make reference to the Commercial Corporation in its so-called "Summary of Policy Proposals[13], but we note that this characterisation is entirely incorrect and inappropriate as none of the substantive policy proposals actually contained in the second Draft White Paper makes any mention of continuing with the separation of divisions much less of a Commercial Corporation to undertake the public commercial activities of the SABC. As we have pointed out above, the opposite is the case.

19.5 Consequently given the gravity of the situation that would arise if the Bill is passed, we repeat that we are at a loss to understand how something which has failed to work for a quarter of a century has found its way into the SABC Bill which is intended to overhaul and rescue the ailing public broadcaster and the Organisations suggest that Parliament needs to satisfy itself that it is not engaging in law-making designed to fail by passing this Bill into law without interrogating how continuing along the same trajectory could not but yield the same results.

19.6 In any event, the provisions of section 9 envisage that the SABC itself will provide two separate operational services which is at odds with Chapters 5 to 7 of the Bill which make it clear that a different (albeit a subsidiary) company is to provide the public commercial services.

[13] On p 102 of the second Draft White Paper.

19.7 The key question that Parliament must grapple with when considering the provisions of Chapters 5-7 of the SABC is this: What is magical about a subsidiary company vs a separate division that would produce different results for the SABC?

19.8 The establishment of the Commercial Company is the cornerstone of the entire SABC Bill. Yet the cross-subsidisation model has manifestly failed to secure the financial sustainability or even viability of the SABC for the past 24 years. Parliament cannot, at least not if it wishes to be able to defend the rationality of its law-making processes, ignore this obvious fact.

19.9 The Organisations submit that the above cross-subsidisation/divisional separation issue, on its own, is sufficient to demonstrate to Parliament that the SABC Bill is a non-starter which must be sent back to the Department. However, this is not all that is manifestly wrong with Chapters 5-7. We set out our further concerns below as these too, on their own, are so at odds with the very concept of public broadcasting as to call into question the motives of the drafters and to beg the question of whether or not the overall aim of the SABC Bill exercise is not to wrench the SABC back to being a state broadcaster, contradicting every tenet of democratic media regulation recognised on the Continent.

19.10 Ad subsection 25(5) of the SABC Bill

19.10.1 This subsection requires the Commercial Corporation to submit quarterly performance reports to the Minister.

19.10.2 This is entirely inappropriate.

19.10.3 The Minister is the shareholder representative of the government in the SABC. It is for the SABC Board who is accountable to Parliament (as representing the public) and which reports to Parliament on its activities and those of its subsidiaries. It is for the Board to receive quarterly performance reports as is already provided for in terms of subsection 25(4) of the SABC Bill.

19.10.4 The Minister can have no role in response to such quarterly reports as that would constitute operational involvement which Matojane J has expressly held (in the *SOS* case) would not be appropriate conduct for a Minister *vis a vis* the public broadcaster.

19.10.5 This provision is another reason for Parliament to reject the SABC Bill.

19.11 Ad subsections 26(1) and (5) and 27(2) of the SABC Bill

19.11.1 These subsections give the Minister a veto over the appointment of all directors of the Commercial Corporation and over the selection of the chairperson.

19.11.2 This is entirely inappropriate.

19.11.3 The Minister can have no role whatsoever in regard to appointing the Directors and chairperson of the proposed Commercial Corporation which is required to provide the public commercial services of the SABC. Indeed this was one of the key issues that Matojane J expressly dealt with in the *SOS* case. He held that Ministerial approval of Board appointments was unlawful[14].

19.11.4 These provisions provide more reasons for Parliament to reject the SABC Bill.

19.12 Ad section 29 of the SABC Bill

19.12.1 The Organisations are alarmed at the restrictions imposed on the SABC Board regarding the remuneration of the members of the Commercial Board which should be determined via contractual arrangement between the Board of the Corporation and its subsidiary's Board.

19.12.2 Secondly, the Organisations submit that the kind of Ministerial interference envisaged in section 29 is not in accordance with the requirements set out in the *SOS Case* regarding the need for the Board to control the affairs of the SABC. This kind of interference in Board decisions has already been found to have been unlawful in respect of the SABC by the High Court.

19.12.3 Consequently the Organisations submit that this is a further reason for Parliament to reject the SABC Bill.

19.13 Ad Section 32: Subsidiaries and Accountability

19.13.1 The Organisations note and agree that before any subsidiaries of the SABC are to be established, the necessary feasibility studies and business cases must be undertaken.

19.13.2 The Organisations feel it essential to point out however the irony that no such feasibility study or business case has been undertaken with regard to the establishment of the Commercial Corporation by the Department, the SABC or anyone else, despite the express provisions of subsection (6)[15]. The Organisations are of the view that it is incumbent on Parliament to demand that these be undertaken before the SABC Bill is put before Parliament.

19.13.3 In any event, the Organisations are alarmed at the active role of the Minister in what are clearly intended to be operational issues with regard to subsidiary companies. In particular, the Organisations note that it appears that the Minister is to be given a veto over the establishment or any subsidiary company (see subsections (2) to (4)). Again,

[14] At para [146] of the judgment.
[15] Note the obvious typographical error in the reference to section 33 instead of 32.

the Organisations submit that the kind of Ministerial interference envisaged in section 32 is not in accordance with the requirements set out in the *SOS Case* regarding the need for the Board to control the affairs of the SABC. This kind of interference in Board decisions has already been found to have been unlawful in respect of the SABC by the High Court.

19.13.4 Consequently the Organisations submit that this section and the problems associated therewith provide further reasons for Parliament to reject the SABC Bill.

19.14 AD SECTION 35(1): AMENDMENT OF CORPORATION LICENCE

19.14.1 The Organisations note that the provisions of subsection (1) deem the broadcasting licences of the SABC to be audio and audiovisual content media services and that subsections (2) and (3) purport (unconstitutionally obviously) to give direction to ICASA as to the kinds of licences that are to be provided to the SABC.

19.14.2 The Organisations submit that this is extremely problematic as ICASA lacks the power to grant licences other than broadcasting service licences, electronic communication service, electronic communication network services licences, postal services licences and radio frequency spectrum licences at this time.

19.14.3 Indeed, the whole point of the Draft White Paper process is to develop policy which will inform the amendment of the legal and regulatory frameworks for licensing content services in due course. As we have pointed out above, there is no category of audio or audio-visual content media services in our law and indeed, as the Committee will doubtless know, ICASA is expressly prohibited from licensing content services at this time as these are excluded from the definitions of both “broadcasting” and “electronic communication” in terms of the ECA.

19.14.4 It is, of course, entirely inappropriate for this to be done by way of a deemed licensing provision in a Bill when the underlying policy is not even finalised yet as Parliament undoubtedly recognises. Consequently the Organisations submit that this section and the problems associated therewith provide further reasons for Parliament to reject the SABC Bill.

20. AD SECTION 36: REGIONAL TELEVISION SERVICES

20.1 The Organisations are perplexed at the inclusion of this section in the SABC Bill when this exact wording has been in place for 24 years and ICASA has seen fit to determine that regional television services are not financially viable and sustainable.

20.2 Consequently the Organisations submit that this section and the problems associated therewith provide further reasons for Parliament to reject the SABC Bill.

21. AD SECTION 37: ACCOUNTS

21.1 The Organisations are disappointed that the Department saw fit to rehash certain provisions from the Broadcasting Act almost word for word, regarding separate books of account for public and public commercial services.

21.2 This is particularly troubling given the Department's own view of the failures of the attempted division of the SABC's services into public and public commercial, which have never been actualised in practice, namely:

21.2.1 "***The idea of a commercial division cross-subsidizing the public division has been a policy failure since inception…It has become impractical and expensive for the SABC to have separate books for the two divisions as it requires duplication of services to implement this legislative obligation***." – at para 4.2.4 of the first Draft White Paper;

21.2.2 "***The legislative provisions dealing with the split of the Corporation's services into public and public commercial services should be removed and all of the current broadcasting licences held by the SABC should be converted into public broadcasting service licences***" – at para 4.2.5 of the first Draft White Paper; and

21.2.3 Indeed, even in the second Draft White Paper, the Department stated as a matter of policy that: "**The assumption [namely that the commercial services would generate sufficient revenue to cross-subsidise public stations and channels] has proven to be incorrect as it has been the public services which have been more commercially successful**" – at para 4.2.4 of the second iteration of the Draft White Paper.

21.3 The Organisations are also perplexed at the reference in subsection (4) to ICASA verifying "cross-subsidies". ICASA cannot verify something which does not actually exist. The Department itself has repeatedly acknowledged that the public services of the SABC have been, and are, more commercially successful than the commercial ones. Consequently it would be impossible for ICASA to verify the supposed cross-subsidisation of the public services by the commercial services as no such cross subsidisation has ever taken place.

21.4 Consequently the Organisations submit that this section and the problems associated therewith provide further reasons for Parliament to reject the SABC Bill.

22. AD SECTION 39: TELEVISION LICENCES

22.1 We have set out in detail our concerns with this section in paragraph 9.7 above.

22.2 We reiterate that this section of the Bill is particularly troubling given the Department's own view of the failures of the television licence fee, namely:

"***Provisions on…Financial Matters…require review and consequential amendments, including amendments to the TV Licence Fee section to broaden the definition and the collection system for television licence and to strengthen enforcement mechanisms and penalties for non-payment***" – at para 4.2.2.3 of the Draft White Paper.

22.3 The Organisations agree with the policy statements by the Department in its own Draft White Paper set out above and in a detailed response to the Department's first iteration of the SABC Bill we proposed:

22.3.1 an entirely new Public Information Levy to be levied on non-SASSA grant receiving adults who are able to access the public content services of the SABC. The principle is one person – one levy payment;

22.3.2 a collection system that involves retailers and subscription television and Electronic Communications Service operators assisting in the collection of the Public Information Levy in order to improve the rate of collection; and

22.3.3 a stipulation that the Public Information Levy be used solely to produce or acquire content, in the draft section 27 of SOS's Draft SABC Bill.

22.4 SOS's proposed alternatives are contained in its alternative SABC Bill (see paragraph 3 above).

22.5 In any event, it is clear that the SABC Bill's re-statement of the Television Licence Fee provisions is not in accordance with the Draft White Paper and in any event the Television Licence Fee itself has been another self-evident failure since inception nearly a quarter of a century ago.

22.6 Consequently the Organisations submit that this section and the problems associated therewith provide further reasons for Parliament to reject the SABC Bill.

23. AD SECTION 41: REGULATIONS

23.1 Again, the Organisations are disappointed that the Department saw fit to rehash the provisions on television licence fee regulations from the Broadcasting Act when the television licence fee has proven impossible for the SABC to enforce and collect. The Organisations are of the view that this section of the Bill, as with the rest of the SABC Bill, must be scrapped and entirely rethought.

23.2 The Organisations find the provisions of section 41 of the Bill particularly troubling given the Department's own view of the failures of the television licence fee, namely:

"***Provisions on…Financial Matters…require review and consequential amendments, including amendments to the TV Licence Fee section to broaden the definition and the collection system for television licence and to strengthen enforcement mechanisms and penalties for non-payment***" – at para 4.2.2.3 of the Draft White Paper.

23.3 The Organisations agree with the policy statements by the Department in its own Draft White Paper set out above and has proposed an entirely new section empowering ICASA to make Public Information Levy Regulations in line with its proposals regarding the introduction of such a Public Information Levy, in its submissions on the Department's first iteration of the SABC Bill.

23.4 Further, it is no longer appropriate that the Minister (and not ICASA) makes regulations on these matters. Indeed in the first iteration of the SABC Bill, the Department recognised this and proposed that ICASA makes these Regulations instead of the Minister. The Organisations remain concerned at the unconstitutional hobbling of ICASA's regulatory independence with regard to the making of these regulations by the Minister.

23.5 Consequently the Organisations submit that this section and the problems associated therewith provide further reasons for Parliament to reject the SABC Bill.

24. AD SECTION 42: TRANSITIONAL ARRANGEMENTS

24.1 The Organisations have set out in detail the myriad problems with the proposed establishment of the Commercial Corporation and have argued why it would be irrational for Parliament to pass the SABC Bill as is.

24.2 Consequently the provisions relating to provisional arrangements involving the commercial corporation also cannot be passed into law at this time.

25. AD SECTION 43: REPEAL OF LAWS

25.1 The Organisations reiterate arguments made above in paragraphs 6 and 9.8, regarding the need to amend the FPMA and the PPPFA and note that no proposed amendments are contained in the Schedule to the SABC Bill.

25.2 Consequently the Organisations submit that this section and the Schedule provide further reasons for Parliament to reject the SABC Bill.

26. CONCLUSION

26.1 The Organisations thank the Committee for this opportunity to comment on the SABC Bill as introduced in Parliament and reiterate our desire to make oral representations at any hearings to take place on the Bill.

26.2 It is clear from this submission that both organisations are of the view that it would be irrational for Parliament to proceed with the SABC Bill given the myriad problems identified above and given that the underlying policy process, the White Paper process, has yet to be completed.

26.3 Consequently the Organisations submit that Parliament must reject the SABC Bill at this time and require the Department to withdraw same.

Yours Sincerely

Uyanda Siyotula (SOS National Co-ordinator)

William Bird (MMA Director)

Reggy Moalusi (SANEF Executive Director)