

Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations



The Commonwealth

Office of Civil and
Criminal Justice Reform

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Introduction

Open and pluralistic broadcasting is a key component of a democratic society. Specific features of broadcasting regulation which are related to the effective promotion of democracy include having a right of appeal and a right of reply, an obligation for news to be accurate and impartial, as well as clear rules on the prevention of discrimination and incitement to crime, including religious or ethnic hatred.

The application of such rules, as well as the full range of broadcasting regulation is often achieved by a regulatory body that operates independently of political or industry influence and control. To be independent, the remit and the means of funding of the regulator should be set out in law. The appointment process must be managed in a way that avoids political interference, and individual regulators must not have any conflicts of interest which prevent them executing their duties in a clearly objective way.

Each country's culture will affect the detail of rules that are intended to protect minors and avoid offence on grounds of taste and decency. Generally, the content of advertising is also regulated, at least to ensure it is legal, decent and true.

Broadcasting regulation can also have economic purposes such as the application of international trade agreements or promoting inward investment. Regulation can also be used as an incentive for domestic production sectors and to promote new technology such as digital broadcasting.

Although many Commonwealth member countries have sophisticated broadcasting legislation with dedicated, independent regulators and public service broadcasters, not all do. These Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations are designed as a means of disseminating good practice across the Commonwealth in the separation of government from civil society, and in pursuance of democratic principles, as regards legal and regulatory infrastructures for Commonwealth broadcasting.

Background

Law Ministers and Attorneys General of Small Commonwealth Jurisdictions discussed draft basic principles for the regulation of broadcasting services at their meeting held 21 and 22 October 2004, at Marlborough House, London.

At that meeting, Law Ministers and Attorneys General expressed support for the view that standards in broadcasting regulation could be set on a Commonwealth or regional level, distanced from national political debate. The Secretariat was requested to bring forward proposals for a work programme to further develop such principles with a view to dissemination of good practice throughout the Commonwealth.

Resultant draft Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations were subsequently presented to and considered by Commonwealth Law Ministers at their meeting held 17 to 20 October 2005 in Accra, Ghana. Law Ministers endorsed the Guidelines and encouraged the Commonwealth Secretariat to assist member countries in their implementation.

Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations

Introduction

1. Following the Meeting of Law Ministers from Small Jurisdictions in October 2004 in which Ministers discussed a paper setting out the basic principles of the regulation of broadcast services, the Secretariat has developed these guidelines with a view to assisting the roll-out of best practice throughout the Commonwealth.
2. From initial desk research of a number of Commonwealth states, it would appear that the majority have not yet established independent broadcast regulatory authorities, but still retain direct state control over issuing broadcast licences, and in many cases, the regulation of content and content-related issues.
3. The lack of independent regulatory bodies tends to be matched by the retention of state, rather than independent public service broadcasters (PSBs). Yet, the creation of independent regulators and PSBs is one of the ultimate tests of the establishment of a successful democracy.
4. These guidelines set out the clear benefits of regulating broadcasting by means of an independent body, and of the provision of broadcasting in the public interest - in the famous words of Lord Reith of the BBC - to "inform, educate, and entertain" citizenry. Practical considerations of how to establish independent regulators and public service broadcasters are discussed.

Independent Regulation

5. It is accepted best practice throughout the world that as an independent broadcasting industry develops, so too must an independent regulatory system to licence and oversee this industry. The development of democracy requires the availability of a variety of sources of information and opinion so that the population can make informed decisions at times of elections. Throughout the world, television and radio are now the main sources of news and information. To enable open debate for the proper operation of democracy there needs to be a plurality of service providers to enable access of viewers and listeners to a wide range of sources of news and information.

6. If decisions on who shall hold a broadcast licence are left as the sole preserve of government, there is unlikely to be - or to be seen to be - a fair, equitable range of service provision. Indeed, in many countries where the government (or a government-controlled regulator) determines new licences, those broadcasters – unsurprisingly – all overtly support the government.
7. But if government control of broadcasting regulation provides a degree of political support, then why should a government give up this control? Last year, the government of a country in South East Europe that not only controlled the regulatory authority but also all the television broadcasters lost power in a general election. People said that “the voters were smarter than the viewers”. Proper delegation of licensing responsibilities to an independent regulatory body set up by statute not only creates faith in the fairness of the licensing process, but can also remove governments from the potential political turmoil which can be associated with the grant of licences. In the last few years we have seen political unrest turn to protest and murder as a result of a government-sponsored broadcasting regulator in Armenia revoking the licence of a popular television station which was perceived to support the opposition party. Since then, Armenia has changed its law to enable the creation of a more independent regulator - putting more distance between the state and the regulator, and de-politicising broadcasting regulation.
8. Throughout the former Soviet bloc in Eastern Europe countries have struggled with the separation of media and the state. Now, it is only the most fervently dictatorial and still communist states such as Belarus and Moldova that retain strict state control over the regulation of broadcasting. Even so, newer democracies such as the Czech Republic and Poland still struggle with ensuring their broadcasting regulators are sufficiently independent to refute allegations of government interference and political pressure. Members of the Commonwealth, with a longer democratic tradition, should find the process easier. Commonwealth countries understand the separation - and interplay - between the executive and the legislature, and so are better placed to appreciate the clear benefits of releasing broadcasting from executive control, but still subjecting it to clear and proportionate legislative constraint. Yet, even within the Commonwealth, there is room for improvement. There are voices calling for the introduction of broadcasting institutions that are independent of political manipulation, and licensing regimes which encourage diversity, but not at the expense of quality.¹
9. So, on a practical level, what are the considerations and practical obstacles to setting up an independent broadcasting regulator?

Creation and Remit

10. The first matters to decide are the scope of broadcasting regulation, those issues which will remain the preserve of the government, and those which will be the responsibility of the independent regulator.
11. It is normal for governments to retain responsibility for broadcast frequency planning, within ITU and regional agreements, often within a single department which manages all allocated spectrum. However, the UK is an example where a single, converged regulator – Ofcom - has been created to cover broadcasting, telecommunications and spectrum management.

¹ See for example the Caribbean Broadcasting Union at <http://www.caribunion.com/html/FromThePresident.html>

12. Beyond spectrum planning and management, it is also common for governments to retain certain powers in relation to competition issues, or at least to make them the preserve of a specialist competition regulator, rather than a dedicated broadcasting regulator. Again, the UK is an exception, but only in a limited sense. The UK communications regulator, Ofcom, has concurrent powers with the UK competition regulator on issues relating to anti-trust and cartel behaviour, although the competition regulator has sole responsibility for deciding whether mergers are anti-competitive.
13. Other broadcasting-related intellectual property issues are sometimes the preserve of a broadcasting regulator, although more often than not, countries leave disputes over copyright, trademarks, etc. to the general application of law.
14. Other than these issues, the dedicated broadcasting regulator is normally tasked with choosing who will be entitled to a broadcast licence, applying the licensing regime, and ensuring that licensees comply with content requirements. It is best practice for these matters, at least at the highest levels, to be enshrined in statute, although detailed standards are often left to secondary legislation or Codes and Guidelines to be issued by the regulator.
15. The clear advantage of having these matters set out in statute is to provide clarity, not only to the industry, but also to the general public, who will know what to expect with a degree of certainty.

Appointments and termination

16. Another key matter which – to comply with best practice – must be set out in legislation is the manner in which members of the regulatory authority are to be appointed, and the terms of their appointment, in such a way as to safeguard their independence.
17. There is no 'right' way to go about the appointment of members to a regulatory authority. There are many different models, all intended to ensure the creation of an independent board. Some examples are:
 - to ensure that each major political party is equally represented on the authority's board;
 - to allocate a number of places (typically 3) to each of the President, the Parliament, and Government;
 - to allocate nominations to certain sectors of civil society (e.g. the judiciary, academics, trade unions, churches, the professions), with final selections voted on in Parliament;
 - to publicly advertise for members, and applicants to be short-listed and selected by civil servants, for final approval by Parliament; or
 - to apply strict qualifying criteria for applicants (e.g. business or legal experience, quotas based on ethnic minority, race or gender), with selection made by a representative group of senior politicians.
18. In each country, careful consideration has to be given to the mode of appointment – what process will deliver the best group of members who will be able to act independently, and will have the trust and respect of the industry, the general public, and politicians?

19. What helps in this process is setting a clear job specification: what set of skills and experience is needed on the authority? Selecting the right people not only ensures the authority is equipped to do its job, but avoids accusations of 'jobs for the boys'. Also, membership of the regulatory authority ought generally to reflect - or be capable of representing - the composition of the nation in terms of gender, ethnic make-up, religious orientation, etc. This is in line with one of the agreed principles on accountability agreed by Law Ministers in November 2002.²
20. The rules of appointment should also be defined to protect the authority members from interference from political or economic forces. It is fairly axiomatic that members (and their close family) should not hold political office, or have any financial interest in any part of the sector they will be regulating. Some countries believe that members should not be permitted to take any other work or have any other earned income during their tenure on the authority, in order to protect them from potential monetary influence. This clearly depends, though, on the size of the job to be done; if the job of the member is not full-time, then other safeguards need to be put in place to ensure that no conflicts of interest arise.
21. As well as defining the terms of appointment, the terms of dismissal should also be set out in statute to avoid an irate government using the threat of dismissal as a political lever. Dismissal should only be possible in limited circumstances, namely physical or mental incapacity, regular non-attendance, insolvency or bankruptcy, conviction of a serious criminal offence, or clearly breaking the rules of appointment (for example by not declaring a conflict of interest).

Funding

22. Another vital element to ensuring independence is providing a secure means of funding of the regulatory authority. In order to avoid government authorities applying political pressure on the regulator through funding mechanisms, arrangements for funding should be specified in law in accordance with a clearly defined plan, and with reference to a transparent budgeting process.
23. Internationally, the accepted best method for arranging funding of the broadcasting regulator is by having the regulator's costs paid by the industry it regulates through licence and other fees. However, this will only work in countries where the broadcasting industry is sufficiently large and profitable to be able to afford to pay for its regulator. In countries with a small or immature broadcasting market, at least a proportion of the costs of regulation must be met from the public budget. Any proposal to create a new regulatory authority will need carefully to consider the costs of the authority, and how those costs are to be met in the most efficient way; authorities need not be large – especially in smaller jurisdictions. There are an increasing number of jurisdictions which are merging existing regulatory bodies, or creating new ones, to regulate both broadcasting and telecommunications. This can also lead to significant cost efficiencies.
24. Especially where funding is, at least in part, directly from central state budgets, care must be taken to ensure funding is safeguarded against actual or potential political pressure. It is strongly advisable to set out in the founding statute of the regulatory authority how the annual budget of the regulator is to be assessed and approved.

² See Commonwealth Principles on the Accountability of and the Relationship Between The Three Branches of Government, April 2004.

Accountability

25. Independence from government requires clear mechanisms whereby the regulator can demonstrate accountability for its actions, and justify its receipt of public funds. This can include a requirement in law for the regulator to publish its annual report and accounts, and a means by which the authority must account for itself to Parliament – often by means of the Chairman and other Board members attending a special meeting or committee of Parliament to answer questions. This should not be taken as an opportunity for political pressure to be applied, but to ensure that the authority is managing itself properly with due efficiency and value for money.
26. The duties and powers of the broadcasting regulatory authority, as well as the ways of making the authority accountable, the procedures for the appointment of members, the criteria for the termination of their appointment, and the means of funding should all be clearly defined by law.

An Independent Public Service Broadcaster (“PSBs”)

27. While fledgling states may have relied upon their own state broadcaster to keep the populace informed and entertained, as democracy develops, particularly in a multi-channel environment, this level of state control and intervention is no longer sustainable or justifiable. As citizens become able to access a range of television and radio services (both domestic, and transmitted by satellite), they are less likely to tolerate the bias of a traditional state broadcaster. Yet, it remains a clear public interest objective to provide citizens with a service which reflects their own culture and interests them, and is supported by their domestic industries. No country wants to see its citizens able to access only international broadcasts. This is where the introduction of a public service - rather than a state - broadcaster adds value and plays an integral part in retaining and developing cultural identity.
28. The international model of public service broadcasting is the UK’s BBC. However, it is unrealistic to expect to be able to create a new publicly-funded broadcaster with the resources and breadth of the BBC, which has been in existence since 1927 and still retains over half of the UK’s radio listening, and a quarter of all television viewing. But the principles which inform the BBC remain relevant to PSBs worldwide:
 - to sustain citizenship and civil society;
 - to promote education and learning;
 - to stimulate creativity and cultural excellence;
 - to reflect the nation and its regions and communities;
 - to bring the world to the UK, and the UK to the world.³
29. This is done through the provision of a universally receivable service, and diverse programming catering for minority, as well as popular interests.
30. UNESCO defines public service broadcasting as “broadcasting made, financed and controlled by the public, for the public. It is neither commercial nor state-owned, free from political interference and pressure from commercial forces. Through PSB citizens are informed, educated and also entertained. When

3 See the DCMS BBC Charter Review on the role of the BBC: www.bbccharterreview.org.uk.

guaranteed with pluralism, programming diversity, editorial independence, appropriate funding, accountability and transparency, public service broadcasting can serve as a cornerstone of democracy.”⁴

31. The Asia-Pacific Institute for Broadcasting Development (AIBD) says, “ Public service broadcasting features key components of universality, cultural diversity, creativity and editorial independence; it can stimulate the entire broadcasting landscape to improve quality and effective service to society.”⁵
32. A meeting of Ministers on Information and Broadcasting in Asia and the Pacific region was held in Bangkok from 27-28 May 2003 to look at the challenges faced by public broadcasters in the region. A Declaration arising from the Conference states that:

“Authorities are encouraged to:

 - (1) Allow autonomy in content creation, management, finance and administration of public service broadcasters;
 - (2) Study and consider the following funding mechanisms for public service broadcasting:
 - i. One-time fee while buying a radio/television/electronic appliances/ mobile phones
 - ii. Introduction of a license fee either as a stand-alone or as an addition to the electricity bill
 - iii. Government grants for infrastructure
 - iv. Advertising/commercial revenue, but it should not undermine the mandate of public service broadcasting
 - v. Sponsorship
 - vi. Contribute to production of programs for clearly defined developmental needs;
 - (3) Regularly review the mandate of public service broadcasting in view of national, regional and global events in order to foster mutual understanding, tolerance and trust;
 - (4) Allocate preferential frequencies to public service broadcasters;
 - (5) Create legal structures to allow independence of decision making to public broadcasters;
 - (6) Ensure allocation of adequate time by private networks for public service programs and for pluralistic content for all groups of society;
 - (7) Ensure complete editorial independence.”⁶
33. Although set up with good intentions, many public broadcasters in the South Pacific region remain under state control. For example the Charter of Radio Televisyen Malaysia, which purports to be a PSB, says, “ We pledge to ensure the

4 See http://portal.unesco.org/ci/en/ev.php-URL_ID=1525&URL_DO=DO_TOPIC&URL_SECTION=201.html.

5 See http://www.aibd.org.my/page/www_activity_schedule/f2f/2652.html.

6 <http://www.aibd.org.my/conferences/bangkok/declaration.html>.

standard of broadcasting is of the highest quality, *in line with the government's policies and aspirations*, to cater to the varied tastes of the society" (emphasis added).⁷

34. Similarly, the Pakistani Broadcasting Corporation, created by statute in 1972, sets out many admirable objectives including:
- " To provide broadcasting services in the fields of information, education and entertainment through programmes which maintain a proper balance in their subject matter and a high general standard of quality and morality;
 - To broadcast programmes to promote Islamic Ideology, national unity and principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam;
 - To reflect the urges and aspiration of the people of Pakistan and promote principles of democracy and culture of freedom and tolerance;
 - To present news of events in as factual, accurate and impartial manner as possible and *to carry out instructions of Federal Government with regard to general pattern of policies in respect of programmes*;
 - To broadcast programmes in the External Services to foreign countries with a view to promote friendship and project Pakistan's view point on international issues in true perceptive" (emphasis added).⁸

35. While many nations have sought to learn from international experience of 'best practice', there are accusations that - particularly in the emerging and newer democracies - public broadcasters remain the voice of government under strict political control. The Media Institute of Southern Africa, which seeks to promote a diverse, pluralistic and independent media sector, says:

"A public broadcasting system detached from state influence is absolutely essential to dissemination of impartial and diverse information. An independent and well-performing public broadcasting system examines public issues with an incisively critical eye by providing programmes that include public debate, cultural expressions and educational programming aside from entertainment. Public Service Broadcaster (PSB) should unfailingly render service to individuals, communities and societies in order to contribute to a shared political, social and cultural frame of reference and bring about social cohesion among different peoples. This form of PSB, which meets its audience not only as consumers but as citizens, binds democratic societies and develops national identity and cultural preservation...

The Public Service Broadcasting obligation, in short, is to supply the public on a national level basis with diverse balanced programmes relevant to all groups of the population, including minorities, maintain integrity towards economic, social, cultural and political interests of the country."⁹

36. In September 2004, a workshop with participants from the African Commission, broadcasting regulators, broadcasters and parliamentarians from six Southern African Commonwealth states (plus Zimbabwe) concluded that most national broadcasting services in Southern Africa were still state broadcasters. This is contrary to Article 9 of the African Charter's "Declaration on Principles of Freedom of Expression in Africa", as interpreted by the African Commission

7 http://www.rtm.net.my/english/web/vision_mission.htm.

8 <http://www.radio.gov.pk/Object.html>.

9 See www.misa.org/broadcasting.html

on Human and Peoples' Rights. This binding interpretation says that state broadcasters are to be transformed into PSBs, which are accountable to the public through legislation, rather than through the government, with adequate funding to protect them from arbitrary interference. In Africa, it is generally considered that the only true PSB is in South Africa. While other countries, notably Ghana and Kenya, have ended overt state control of their broadcasters, they remain subject to out-dated legislation which means that structurally and legally the broadcasters remain state, rather than PSBs.

37. So how does a government go about creating a public broadcaster with a primary purpose to serve the public, belong to the public, and which is accountable to the public?

Creation and remit

38. First, as with an independent regulatory authority, the PSB must be set up by statute, with a clearly defined mandate which preserves the PSB's editorial independence. The remit of the PSB should clearly state that it is there to serve the public interest, taking into account ethnic, cultural, religious and other diversity.

Appointment and termination

39. The board which governs the PSB should be appointed by a process which is free from political control. Similar models of appointment to those of regulatory authorities are used for appointing PSB boards. However, another model should also be considered, drawing from international best practice in corporate governance. That is to have a mixed board of executive (i.e. senior staff who manage the PSB) and non-executive members, with the non-executives all bringing particular skills and experience to benefit the successful running of the broadcaster. This enables the non-executive Board members to share their strategic skills and their ability to represent the public interest, with the creative leadership of the executive.
40. To avoid the risk of political pressure being placed on individual board members, the terms of appointment should be fully spelled out in the founding statute, including the basis upon which appointments may be terminated.

Funding

41. It is vital for the PSB to benefit from adequate, independent funding that will enable the PSB to produce quality programming in line with its remit. To avoid the potential for political interference in editorial matters, the funding mechanism should be settled for a period of a number of years and be inflation-linked. This will provide certainty for funding to the PSB, which is necessary for proper long-term planning.
42. There are many different funding models for PSBs around the world. In some cases the PSB is funded completely through advertising, but in most cases, the PSB's funding is a mix of commercial revenue and public funding. The public money can come from licence fees charged to anyone who buys or owns a radio or television, or for example, an additional charge on electricity bills. In other cases, the funding can come straight from the general state budget, for example as a set percentage of gross national income. In the United States the PSB is funded by voluntary public subscription, but this is not considered to be a desirable model and is not used elsewhere. Deciding on the source of

funding is a major decision which needs to take account of a number of factors including the overall size and strength of the broadcasting sector, the wealth of the population, the popularity of the PSB, and the likelihood of collection of the licence fee.

Accountability

43. As the recipient of public funding, there must be a mechanism by which the PSB can be accountable to the public. As with regulatory authorities, the PSB should publish annual reports and accounts, and be accountable to parliament for the delivery of its remit. However, the PSB ought also to find a way to be accountable to the public it serves. One way of doing this is through conducting regular research to discover how best to serve its audience. Another way is through finding a means of dialogue with listeners and viewers, perhaps by holding public meetings. In states which do not have a cultural history of public engagement with civic bodies, or broadcasters, thought should be given to conducting some sort of advocacy and training programme to inform citizens of the benefits of a PSB and their rights of access to fair and impartial information. In such circumstances, unless there is a proper dialogue between audiences/ citizens and the PSB, the law will have little effect by itself in providing the public with a true service.



The Commonwealth