



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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## General Notice

### COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 192

2018

#### NOTICE OF INTENTION TO PRESCRIBE A BROADCASTING CODE

The Communications Regulatory Authority of Namibia, in terms of section 89 of the Communications Act, 2009 (Act No. 8 of 2009), and the Regulations regarding Rule-Making Procedures published in Government Gazette No. 4630, General Notice No. 334 dated 17 December 2010 -

- sets out the concise statement of the reasons and purpose for the proposed Broadcasting Code in Schedule 1;
- publishes this Notice of Intention to Prescribe a Broadcasting Code for broadcasting licensees as set out in Schedule 2; and
- includes an explanatory memorandum providing background, defining issues, responding to stakeholder input and comments and setting out preliminary views as set out in Schedule 3.

The public are hereby invited to make written representations, comments, communications and submissions (hereafter collective called "submissions") to the Authority within thirty (30) consecutive days from the date of publication of this notice in the *Gazette* in the manner set out below for making of written submissions.

Reply comments to written submissions may be submitted to the Authority -

- a) no later than fourteen (14) consecutive days after the time for the making of written submissions has lapsed; or
- b) if the opportunity for the submission of reply comments is published in a subsequent *Gazette*, after the lapse of fourteen (14) consecutive days from the date of such publication.

All written submissions must -

- a) contain the name and full contact details (physical and postal address, email address and telephone or cell phone number) of the person making the written submissions and the name and similar contact details of the person for whom the written submission is made, if different; and
- b) be clear and concise.

In the event where any person making a submission wishes to designate any information contained in such submission as confidential, such information must be clearly marked as “confidential”. Notwithstanding, if the Authority is of the opinion that information is not confidential it will inform the person thereof thereby -

- a) allowing the person to withdraw the information from the rule-making proceedings;
- b) agreeing with the person that it will not be treated anymore as confidential information; or
- c) requesting a hearing on the issue of confidentiality to be conducted in accordance with section 28 of the Communications Act.

All written submissions must be sent or submitted to be received by the Authority on or prior to the due date anticipated above in any of the following manners:

- a) By hand to the head offices of the Authority, namely Communication House, No 56 Robert Mugabe Avenue, Windhoek;
- b) by post to the head offices of the Authority; namely Private Bag 13309, Windhoek, 9000;
- c) by electronic mail to the following address: [legal@cran.na](mailto:legal@cran.na);
- d) by facsimile to the following facsimile number: +264 61 222 790; or
- e) by fax to email to: 0886550852.

**F. KISHI**  
**CHAIRPERSON**  
**COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA**

## **SCHEDULE 1**

### **CONCISE STATEMENT OF PURPOSE**

In accordance with section 89(2), the Authority hereby sets the rules and conditions according to which broadcasting licensees will be monitored by the Authority in terms of section 90 and adjudicated upon subject to section 89 of the Act. The proposed Broadcasting Code gives expression to the Act, specifically to the requirements of section 89(2) of the Act.

The purpose of the Broadcasting Code is to ensure the independent regulation of broadcasting services and access to broadcasting services and broadcasting content in the public interest. As such, the Broadcasting Code contains provisions that, *inter alia*, relate to:

- a) Freedom of expression;
- b) protection of privacy, children and victims of sexual abuse from inappropriate or harmful broadcast communications;
- c) acknowledgement of the special susceptibilities of children and to ensure that commercial communications do not exploit these susceptibilities;
- d) the regulation of hate speech;
- e) regulation against inequality and discrimination;
- f) the promotion of pluralism and national creative identity; and
- g) the provision of broadcasting services which serve the cultural and educational needs of the public,

which are all essential for the provision of broadcasting services in a democratic society.

The Broadcasting Code further aims at promoting and attaining availability of local content, commitment to public debate and discussion as well as transparency and accountability. The local content model endeavours to recognise the need of audiences to be provided with entertainment and programmes meeting the diverse needs of Namibians (including the freedom of audiences to view or listen to contents of their choice) but on the other hand to promote local content so that such choice is balanced against public interest. In developing a local content model for Namibia, the Authority endeavoured to base the local content rules on the following internationally recognised principles:

- (i) Realistic and practical rules, based on suitable criteria, enabling the promotion and protection of local programmes, music and artistic expression expressing Namibia's unique and diverse identity;
- (ii) promoting the role of broadcasting licensees in developing and reflecting a sense of Namibian identity, character and cultural diversity by supporting audience access to local content;
- (iii) minimising the displacement of the Namibian local sector by contents from countries with large and highly developed broadcasting and production sectors;
- (iv) promotion of freedom of expression and cultural rights by means of pluralism and diversity;
- (v) ensuring that local content rules are implemented through an appropriate legal dispensation;
- (vi) recognising the differences between different type of broadcasting licensees;
- (vii) allowing for a phasing-in period and progressive implementation;
- (viii) following a layered approach which includes periodic measurement of local content requirements;
- (ix) undertaking periodic review of local content requirements and achievements to allow local content to be progressively build upon.

The Authority reserves the right to revise, review and amend any provision of the Broadcasting Code subsequent to the consideration of submissions by stakeholders.

## **SCHEDULE 2**

### **DRAFT BROADCASTING CODE FOR BROADCASTING LICENSEES ISSUED IN TERMS OF SECTION 89 OF THE COMMUNICATIONS ACT, 2009**

The Communications Regulatory Authority of Namibia, in terms of section 89 of the Communications Act, 2009 (Act No. 8 of 2009), prescribes the Broadcasting Code for Broadcasting Licensees set out in this Schedule.

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## **PART A DEFINITIONS AND APPLICATION**

### **Definitions**

**1.** In this Broadcasting Code, any word or expression to which a meaning is assigned in the Act, has the same meaning and -

“Act” means the Communications Act, 2009 (Act No 8 of 2009);

“advertisement” means any visual or aural communication, representation, reference or notification of any kind, which is intended to promote the sale, leasing or use of any brand, product, belief, goods or services, or which appeals for or promotes the support of any cause and includes promotional content of display material, menus, labels, and packaging but excludes editorial material unless it is editorial material for which consideration has been given or received;

“audience” means both the viewers and listeners of television and radio broadcasting licensees;

“broadcasting licensee” means a broadcasting service licensee as set out in the Regulations Setting Out Broadcasting and Telecommunications Service Licence Categories published in Government Gazette No. 4714, General Notice No. 124 of 18 May 2011, as amended in Government Gazette No. 5148, General Notice No. 74 of 13 March 2013;

“by-election” means an election through which a vacancy is filled as contemplated in section 63(2) of the Electoral Act;

“child” means a person under the age of 18 years as defined in section 1 of the Child Care and Protection Act, 2015 (Act No. 3 of 2015), and reference to “children” has the same meaning;

“controversial issue” means an issue of public importance to the Namibian people which has topical currency and excites conflicting opinions;

“current affairs” means a programme which is not news but which predominantly focuses on and includes interviews, discussions and comments with regard to, and interpretation and analysis of, issues of immediate social, political or economic relevance and matters of international, regional and local significance;

“election” means any election of the President, members of the National Assembly or any member of a regional council or local authority council, as the context may require, and, if relevant, includes a by-election;

“election broadcast period” means the period within which party election broadcasts may be transmitted commencing after nomination day and ending 48 hours before polling commences;

“Electoral Act” means the Electoral Act, 2014 (Act No. 5 of 2014);

“local content” means local content music and local content programmes;

“local content music” means work which is a verbal-musical work originally performed in a Namibian language by a debutant or is a work which complies with at least two of the following criteria, namely -

- (a) the lyrics (if any) were written predominantly by a Namibian citizen or by a person permanently resident in the Republic of Namibia;
- (b) the music was written predominantly by a Namibian citizen or by a person permanently resident in the Republic of Namibia;
- (c) the music or lyrics was or were principally performed by musicians who are predominantly Namibian citizens or who are predominantly permanently resident in the Republic of Namibia;
- (d) the musical work consists of a live performance which is -
  - (i) recorded wholly in the Republic of Namibia; or
  - (ii) performed wholly in the Republic of Namibia and broadcast live in the Republic of Namibia;

“local content programme” means a programme, which is produced –

- (a) by a broadcasting licensee;
- (b) originally in a Namibian language on the basis of a script originally in such Namibian language and first registered and broadcast in the Republic of Namibia;
- (c) by a person who is a citizen or permanently resident of the Republic of Namibia (whether or not the programme is produced in conjunction with a co-producer, or an executive producer, who is not a Namibian citizen or a permanent resident of Republic of Namibia but subject to paragraph (c) of this definition);
- (d) by a juristic person of which the majority of the directors, shareholders or members are citizens of, and permanently resident in, the Republic of Namibia;
- (e) in a co-production in which persons referred to in subparagraphs (a), (b) or (c) have at least a 50 percent financial interest;
- (f) by persons referred to in subparagraphs (a), (b), (c) or (d), in circumstances where the at least 50 percent of key personnel who are involved in the production of the programme, are citizens of, and permanently resident in, the Republic of Namibia; or
- (g) by persons referred to in subparagraphs (a), (b), (c) or (d), in circumstances where at least 20 percent of the production costs are incurred in the Republic of Namibia;

“Namibian language”, for purposes of the definition of “local content music” means -

- (a) an indigenous Namibian language or a dialect of such indigenous language;
- (b) any other language spoken by Namibians in the Republic of Namibia subject thereto that in such event the debutant must be a Namibian citizen or permanently resident in the Republic of Namibia;

“NBC” means the Namibian Broadcasting Corporation established in terms of the Namibian Broadcasting Corporation Act, 1991 (Act No. 9 of 1991);

“news” means programming, which is not current affairs, by a broadcaster in which it predominantly presents factual new information on, or reports on news relating to, events of immediate social, political or economic relevance and on matters of international, national and local significance;

“nomination day” means a day determined as nomination day in terms of section 64(1)(a) of the Electoral Act;

“party election broadcast” means any programme, whether pre-recorded or a live event, which is -

- (a) broadcast free of charge or for a fee determined by the licensee; or
- (b) intended or calculated to advance the interests, beliefs or objects of any political party or candidate;

“performance period” means the period of 126 hours in one week measured between the hours 05:00 and 23:00 each day;

“political party” means a political party registered in terms of section 137 of the Electoral Act;

“polling day” means a day determined as a polling day in terms of section 64(1)(b) for voting in an election or a day determined under section 119(5) for voting in a referendum;

“programme” for purposes of the definition of a “local content programme”, means any sound, text, still picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically;

“referendum” means a referendum held as anticipated in section 119 of the Electoral Act;

“sexual conduct” means:

- (a) The display of genitals or of the anus;
- (b) masturbation;
- (c) sexual intercourse including anal sexual intercourse;
- (d) in the case of child pornography, the fondling or touching of breasts, genitalia or the anus;
- (e) the penetration of a vagina or anus with any object;
- (f) oral genital contact;
- (g) oral anal contact;
- (h) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person;
- (i) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object

into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or

- (j) cunnilingus or any other form of genital stimulation;

“subscription television broadcasting licensee” means a broadcasting licensee providing broadcasting services to a subscriber upon payment of a fee; and

“watershed period” means the consecutive period commencing at 22:00 on a day and ending at 05:00 of the ensuing day.

### **Application**

2. (1) This Broadcasting Code applies to all commercial and community broadcasting licensees unless -

- (a) specifically otherwise determined herein; or
- (b) a determination was made in terms of section 89(4) of the Act that a licensee does not require regulation by a broadcasting code.

(2) Pursuant to section 93 of the Act, until a date determined by the Minister, this Broadcasting Code will not apply to the broadcasting services or to any broadcasting activities carried on by the NBC.

## **PART B GENERAL CONDITIONS**

### **Obligations regarding information on this Broadcasting Code**

3. (1) A broadcasting licensee must ensure that relevant employees and programme-makers, including those from whom such licensee commissions programmes, understand the content and significance of this Broadcasting Code.

(2) A broadcasting licensee must have procedures in place for ensuring that programme-makers and channel providers can seek guidance from such licensee regarding the relevance and application of this Broadcasting Code.

### **News and current affairs**

4. (1) Subject to this rule, a broadcasting licensee must use reasonable efforts to -

- (a) report news in a factually accurate, impartial and non-partisan manner; and
- (b) present current affairs in a balanced, clear, factual, accurate and impartial manner.

(2) A broadcasting licensee must present news in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by -

- (a) distortion, exaggeration or misrepresentation;
- (b) material omissions; or
- (c) summarisation.



(3) A broadcasting licensee may present as fact only such news as may reasonably be true, having reasonable regard to the source of the news, and that fact must be broadcast fairly with reasonable regard to context and importance.

(4) Where a report or an account by a broadcasting licensee -

(a) is not based on fact; or

(b) is founded on opinion, supposition, rumours or allegations,

such account must be presented in such a manner as to clearly indicate that that is the case.

(5) Where a broadcasting licensee has reason to doubt the correctness of a report or an account and it is -

(a) practical to verify the correctness thereof, the report or account must be verified;

(b) not practical to verify the correctness thereof, that fact must be mentioned in the report or account.

(6) Where it subsequently appears that a broadcasting report or account was incorrect in a material respect, the broadcasting licensee must make reasonable efforts to correct or clarify such incorrectness within a reasonable time and the rectification or clarification -

(a) must be made with an appropriate degree of prominence to attract attention; and

(b) may be made during a later episode of the relevant broadcast or a comparable broadcast; or

(c) may be made on the broadcasting licensee's or relevant programme's website, home page or main website, as appropriate; or

(d) may be made in any other way which is appropriate under circumstances.

(7) Unless prior valid consent from the victim concerned is obtained, or in the event of the victim being a child, also the consent of the victim's guardian, a broadcasting licensee may not divulge in a broadcast, whether as part of the news or not, the identity of:

(a) Rape victims;

(b) victims of gender based violence;

(c) other victims of sexual violence; or

(d) children implicated in criminal cases.

(8) A broadcasting licensee must advise its audience in advance of -

(a) scenes or reporting of extraordinary violence, or graphic reporting on delicate subject matter (for example of a sexual nature); or

(b) court action related to sexual assault,

and must pay particular attention to this duty during afternoon or early evening newscasts and updates.

(9) A broadcasting licensee may not include explicit or graphic language related to news of destruction, accidents or sexual violence, which could disturb children or sensitive audiences, except where it is in the public interest to include such material.

(10) Current affairs programmes are not required to be impartial and may take a particular stance on issues, however, a broadcasting licensee must provide reasonable opportunities for significant alternative viewpoints to be presented when dealing with controversial issues of public importance while such issues have immediate relevance to the audience.

### **Prohibitions relating to sexual conduct and other explicit material**

5. A broadcasting licensee may not broadcast material which contains, or which judged within the context contains, a scene or scenes, simulated or real, of any of the following:

- (a) Child pornography;
- (b) bestiality;
- (c) sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender or sexual orientation and which constitutes incitement to cause harm;
- (d) explicit sexual conduct;
- (e) explicit extreme violence or the explicit effects thereof; or
- (f) explicit infliction of domestic violence.

### **Protection of children**

6. (1) A broadcasting licensee must ensure that reasonable care is exercised in order to avoid content which may disturb or be harmful to children when the licensee broadcasts programmes at times when a large number of children may be likely to be watching or listening to radio or television programmes.

(2) A broadcasting licensee must, in the depiction of violence in children's programming, exercise the following particular care:

- (a) In children's programming portrayed by real-life characters, violence may, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot;
- (b) animated programming for children, while accepted as a stylised form of story-telling which may contain non-realistic violence, must not have violence as its central theme, and must not incite dangerous imitation;
- (c) programming for children must with reasonable care deal with themes which could threaten children's sense of security when portraying, for example, domestic conflict, death, crime or the use of drugs or alcohol;
- (d) programming for children must with reasonable care deal with themes which could influence children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, the use of matches or the use of dangerous household objects as toys;

- (e) programming for children must not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve conflict between individuals;
- (f) programming for children must not contain realistic scenes of violence which minimise or gloss over the effect of violent acts;
- (g) any realistic depictions of violence must portray, in human terms, the consequences of that violence to its victims and its perpetrators;
- (h) programming for children must not contain frightening or otherwise excessive effects not required by the story line;
- (i) offensive language, including profanity and other religiously incentive material, must not be broadcast in programmes especially designed for children; and
- (j) no offensive language should be used before the watershed period on television or radio or at times when a large number of children are likely to be watching or listening to radio or television programmes.

### **Violence and hate speech**

7. (1) A broadcasting licensee may not broadcast material which, judged within the context -

- (a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or
- (b) sanctions, promotes or glamorises violence or unlawful conduct.

(2) A broadcasting licensee may not broadcast material which, judged within context, sanctions, promotes or glamorizes violence or unlawful conduct based on race, age, sex, sexual orientation, ethnicity, colour, nationality, religion, creed, gender, economic or social economic status, age or mental or physical disability.

(3) A broadcasting licensee may not broadcast material which, judged within context, amounts to -

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) is likely to incite, in a reasonable audience, hatred against, or serious contempt for, or severe ridicule of, any person or group of persons because of race, colour, age, ethnicity, nationality, religion, disability, creed, sex, sexual orientation or preferences or gender and that constitutes incitement to cause harm.

### **Privacy, dignity and reputation**

8. (1) A broadcasting licensee must exercise special care and consideration in matters involving the privacy, dignity and reputation of individuals, bearing in mind that these rights may be overridden by a legitimate public interest.

(2) In the protection of privacy, dignity and reputation of individuals, a broadcasting licensee must give special consideration to -

- (a) the applicable customary law concerning the privacy and dignity of people who are bereaved and their respect for their deceased; and
- (b) the privacy, dignity and reputation of children, the elderly, persons living with physical and mental disabilities and any other vulnerable groups of society.

#### **Audience advisory assistance**

**9.** (1) In order to assist audiences in choosing television programmes, a television broadcasting licensee must -

- (a) provide advisory assistance which, when applicable, must include guidelines as to age, where such programmes contain violence, sex, nudity or offensive language;
- (b) show such advisory assistance on the screen for a minimum of 30 seconds after each advertisement or other break;
- (c) where the frequency of the subject matters, or any one or some of them, is high, show a continuous advisory assistance, irrespective whether the programme is broadcast before or after the watershed period.

(2) A television broadcasting licensee must use the following visual advisory assistance age system:

- (a) 10;
- (b) 13;
- (c) 16; and
- (d) 18.

(3) A television broadcasting licensee must use the following symbols in accordance with the relevant content:

- (a) V = (Violence);
- (b) L = (Language);
- (c) N = (Nudity);
- (d) S = (Sex); and
- (e) PG = (Parental Guidance).

(4) A television broadcasting licensee must ensure that an audio advisory assistance accompany the broadcast of a film with an age restriction of 18 before the commencement of the relevant programme.

(5) This rule does not apply to a subscription television broadcasting licensee where such licensee does not have editorial control over the contents of a channel or programme and cannot, within reasonable means, effect the audience advisory assistance required under this rule, subject thereto that such subscription television broadcasting licensee must -

- (a) classify the programmes it intends to broadcast;
- (b) with regard to such classification, indicate appropriate age restrictions for viewing or listening to a programme or indicate the programme as family viewing;
- (c) indicate whether a programme contains nudity, sexual conduct, violence or offensive language;
- (d) provide clear and consistent information to its audience on programme classification in order to enable its audience to select the programmes they do not wish to view or listen or which they do not wish their children to view or hear.

(6) A subscription television broadcasting licensee must implement adequate measures to enable a subscriber to block a programme or certain levels of undesirable material, based on the classification of the programme, or a channel, included in its services (i.e. parental or viewer control).

### **Controversial issues**

**10.** (1) A broadcasting licensee must ensure, in so far as is practical or reasonable, when reporting on a controversial issue that a balanced and reasonable range of significant views and opinions is reported, either within a single programme or within a series of programmes, which shall be broadcast as soon as is reasonably possible.

(2) A broadcasting licensee must ensure, in so far as is practical or reasonable, when broadcasting a controversial issue during phone-in programmes, that a balanced and reasonable range of significant views and opinions is represented.

(3) A person or an organisation whose views have been criticised on any controversial issue during a programme and who makes any representations, within a reasonable time, to the broadcasting licensee responsible for the programme that such person or organisation is aggrieved, must, in so far as is practical or reasonable, be offered an opportunity by the broadcasting licensee to reply to such criticism or comment.

### **Watershed period**

**11.** (1) Subject to rule 5, a television broadcasting licensee may only broadcast programmes on television, which contains scenes of -

- (a) explicit violence;
- (b) sexual conduct;
- (c) nudity; or
- (d) grossly offensive language,

intended for adult audiences during the watershed period.

(2) A broadcasting licensee may only broadcast promotional material and music videos which contain -

- (a) scenes or depiction of explicit violence;
- (b) explicit threatening violence;

- (c) sexual conduct;
- (d) the fondling or touching of breasts;
- (e) nudity; or
- (f) grossly offensive language,

intended for adult audiences during the watershed period.

(3) Some programmes broadcast outside the watershed period may not be suitable for children and a broadcasting licensee must provide sufficient information, in terms of regular scheduling patterns or audience advisory assistance, to assist parents and *de facto* or legal guardians to make appropriate viewing or listening choices for children in their care.

(4) A broadcasting licensee may, with the advance of the watershed period, progressively broadcast more adult material.

(5) A broadcasting licensee must be particularly sensitive to the likelihood that programmes which commence during the watershed period and which run beyond it may be viewed by children.

### **Competitions and audience participation**

**12.** (1) A broadcasting licensee must make known during a broadcast the full cost of a telephone call or a message service, such as an SMS, where audiences are invited on air to react to a programme or competition.

(2) If applicable, a broadcasting licensee must specify the proportion of the cost of the call or message service, such as an SMS, which is intended for any specified charitable cause.

(3) A broadcasting licensee must ensure that audiences invited to compete in any competition broadcast by such licensee are made aware on air of the basic rules of the competition which must include the closing date and the manner in which the winner is determined and publicly announced.

### **Public notices of emergencies or public disaster announcements**

**13.** (1) A broadcasting licensee must without delay broadcast or otherwise distribute, free of charge, a public notice of emergency or a public disaster announcement requested, in writing, by any Government Minister, State-owned Enterprise or any other public authority or organ of State.

(2) The broadcasting licensee must, prior to the broadcast or alternative distribution thereof, verify the authenticity of the notice with the relevant Government Minister, State-owned Enterprise or other public authority or organ of State from which the written request emanates.

(3) A designated position in relation to each broadcasting licensee must be identified as the contact person during business and non-business hours for all matters relevant to this rule.

(4) Compliance with this rule is dependent upon the cooperation of the relevant Government Minister, State-owned Enterprise or other public authority or organ of State involved therein and a broadcasting licensee will not be in breach of this rule if any of them fail to respond to the licensee's request for information, provides inaccurate information or otherwise fail in providing

the broadcasting licensee with information and assistance necessary to effect the broadcast.

### **Comments**

**14.** (1) Subject to this Broadcasting Code, a broadcasting licensee may broadcast comment on and criticism of any actions or events of public importance.

(2) Comments by a broadcasting licensee must be an honest expression of opinion, must be presented in such a manner that it appears clearly to be commentary and must be made on facts truly stated or fairly indicated and referenced.

(3) Where a person stated that he or she is not available, or where a person could not reasonably be reached, for comment, that fact must be stated by the broadcasting licensee in the relevant programme including the effort and manner employed to try and reach the person.

(4) This rule does not apply to subscription television broadcasting licensees.

### **Counter-versions**

**15.** (1) Where it appears that a comment was incorrect or differed in a material respect from what was previously broadcast by a broadcasting licensee, the broadcasting licensee must broadcast or publish, in the manner set out in this rule, a counter-version presented by a person or organisation affected by and objecting against an such incorrect or different fact in any programme transmitted by the broadcasting licensee.

(2) Notwithstanding sub-rule (1), a broadcasting licensee is not obligated to transmit a counter-version in the event where -

- (a) the person or organisation concerned does not have a direct interest in the transmission of the counter-version; or
- (b) the counter-version is not of reasonable length, and in particular, if the counter-version is substantially longer than the part of the broadcast which dealt with the false assertion of fact.
- (3) The counter-version referred to in sub-rule (1) must -
  - (a) be limited to a factual account;
  - (b) not contain any material which may reasonably be anticipated to expose the broadcasting licensee to legal action if that material were to be broadcast;
  - (c) be in writing;
  - (d) specify the programme and the assertions to which the objection is raised; and
  - (e) be signed by the person affected or, in the case of an organisation, by a duly authorised representative of that organisation.

(4) The person or organisation affected is not entitled to insist on the broadcasting or publishing of a counter-version as contemplated in sub-rule (1) if the counter-version is presented to the broadcasting licensee after the expiry of a period of 15 days from the date of broadcast of the apparent incorrect or different fact.

- (5) The broadcasting licensee must, subject to sub-rules (2) and (4) -
  - (a) at the first opportunity, but not later than 10 days from receipt of a counter-version referred to in sub-rule (1), broadcast or publish the counter-version within the same programme or programme section as the one in which the incorrect or different assertion was made and at the same time of day or, should that not be possible or reasonable -
    - (i) at a time equal in value to that of the programme to which the objection relates;
    - (ii) on the broadcasting licensee's or relevant programme's website, home page or main website, as appropriate; or
    - (iii) in any other way which is appropriate under circumstances;
  - (b) broadcast or publish the counter-version without any omissions and interruptions; and
  - (c) broadcast or publish the counter-version free of charge.
- (6) A broadcasting licensee must, immediately upon receipt of the counter-version referred to in sub-rule (1) -
  - (a) inform the Authority about that fact; and
  - (b) keep and store the programme objected to and the counter-version,

until the broadcasting licensee receives a notice to the contrary from the Authority or for a period of at least 12 months, whichever period expires first.

(7) If a broadcasting licensee makes a rectification or clarification in the manner set out in this rule within the specified timeframe, such licensee will not be in breach of sub-rule 4(1), (2), (3), (6) or (10).

### Advertisements

**16.** (1) An advertisement broadcast by a broadcasting licensee must be presented in such a manner that a reasonable audience will be able to identify such advertisement, at the time of the broadcast, as advertising material.

(2) An advertisement must not deliberately cause serious offence to the intended audience.

(3) Advertising must not promote illegal or unsafe conduct or acts or encourage dangerous behaviour.

### Exemptions

**17.** (1) Rules 5 and 7(3) do not apply to –

- (a) broadcasts of *bona fide* scientific, research, documentary, artistic (including comedy or satire), dramatic, literary or religious programming material, which, judged within context, is of such nature;
- (b) broadcasts which amount to a *bona fide* discussion, argument, report or opinion on a



matter pertaining to religion, belief or conscience; or

- (c) broadcasts which amount to a *bona fide* fair comment, discussion, argument or opinion on a matter of public interest,

subject thereto that it is broadcast with due audience advisory after the watershed period on a sliding scale according to contents.

(2) A comment, criticism, opinion or view by a broadcasting licensee is not prohibited if such comment, criticism, opinion or view complies with the following requirements:

- (a) Is honestly-held;
- (b) is without malice;
- (c) pertains to a matter of public interest;
- (d) takes fair account of all material facts which are substantially true; and
- (e) is presented in a manner which clearly indicates that it is a comment, criticism, opinion or view.

(3) Where a broadcasting licensee is of the opinion that a rule applicable to it in this Broadcasting Code will cause it unjustifiable hardship or cannot reasonably be complied with, the licensee may, in writing, apply to the Authority for an exemption or deviation approval from the Authority.

(4) An application contemplated in sub-rule (3) must be sufficiently motivated to substantiate a claim of unjustifiable hardship or inability to reasonably comply with and have attached thereto such additional substantiation as the broadcasting licensee deems relevant.

(5) The Authority must evaluate each application based on the criteria specified as well as section 89(3) of the Act and may -

- (a) refuse the application if the criteria specified are not met;
- (b) grant an exemption to the relevant rule without conditions or with such conditions as the Authority deems appropriate;
- (c) grant such deviation from the relevant rule as the Authority deems appropriate with or without such conditions as the Authority deems appropriate; or
- (d) make such other determination as the Authority deems appropriate under circumstances.

## PART C COVERAGE OF ELECTIONS AND REFERENDUMS

### Party election broadcasts

**18.** (1) A broadcasting licensee may not broadcast, or allow to be broadcast, a party election broadcast under any circumstances except during an election broadcast period.

(2) A broadcasting licensee who decides to broadcast a party election broadcast for a particular party must afford all other political parties a similar opportunity.

(3) A party election broadcast is wholly under the editorial control of the relevant

political party and the broadcasting licensee -

- (a) is not liable for the contents of the broadcast;
- (b) may not broadcast a party election broadcast until the relevant political party's duly authorised representative submits the contents thereof on behalf of that political party;
- (c) may refuse to broadcast the party election broadcast until provided with a signed written indemnification against liability in line with rule 22(7)(b).

### **News and current affairs during elections and referendums**

**19.** (1) News coverage of elections and referendums is at the discretion of the news editor of the broadcasting licensee.

(2) A broadcasting licensee must apply proper balance and fairness to all current affairs programmes that deal with elections or referendums.

### **Balance and impartiality**

**20.** (1) A broadcasting licensee must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.

(2) A broadcasting licensee must ensure that it is balanced and impartial in its election or referendum reporting and that no political party, candidate or proponent is discriminated against in editorial coverage or the granting of access to coverage.

(3) In the event of any criticism against a political party, candidate or proponent being levelled in a particular programme of any broadcasting service –

- (a) without that party, candidate or proponent having been afforded an opportunity to respond in the same programme; or
- (b) without the view of that party, candidate or proponent having been reflected therein,

the broadcasting licensee concerned must afford that political party, candidate or proponent a reasonable opportunity to respond to the criticism.

(4) In making advertising time available to political parties, no broadcasting licensee may discriminate against any political party or make or give any preference to any political party or subject any political party to any prejudice.

(5) Should a political party forfeit or decide to forfeit its allocated party election broadcast airtime, then that airtime must be used by the broadcasting licensee concerned for the purpose of broadcasting its normal programming or material.

(6) Should a political party not wish to use its allocated party election broadcast airtime, the broadcasting licensee concerned must not, during the relevant time-slot, in any way vary the sequence or scheduling of party election broadcasts.

### **Allocation of free airtime by the NBC**

**21.** (1) Subject to section 93(1) of the Act, where the NBC offers free airtime to various political parties participating in an election, it must do so on the basis of the respective

formula set out in rule 22 of this Broadcasting Code.

(2) Subject to section 93(1) of the Act, a political party intending to broadcast a party election broadcast utilising the free airtime as allocated by the NBC above must submit its broadcast contents to the NBC at least 96 hours prior to the broadcast thereof.

(3) If a political party fails to deliver the party election broadcast to the NBC before the expiry of the time set out in sub-rule (2), the political party is deemed to have forfeited its free allocated airtime.

(4) In the event of an election and in accordance with rule 22, the formulae must be submitted at least seven days after the publication of the polling day.

### **Party election broadcasts**

**22.** (1) A political party intending to broadcast a party election broadcast must submit its broadcast contents to a broadcasting licensee at least 96 hours prior to the broadcast thereof.

(2) The political party's party election broadcast contents must be accompanied by a written script in English but, should the political party wish to use a local language, a script must be provided in such language together with a translation thereof in English.

(3) A broadcasting licensee obligated, or intending, to broadcast party election broadcasts must ensure that a political party's party election broadcast contents conforms with this Broadcasting Code.

(4) A broadcasting licensee, to whom a political party submitted its party election broadcast contents for broadcasting, may not in edit or alter the content thereof.

(5) A broadcasting licensee may not reject a political party's party election broadcast contents without reasonable cause and in such event the broadcasting licensee must -

(a) no longer than 24 hours after having received the political party's party election broadcast contents furnish the political party concerned with written reasons for the rejection; and

(b) allow the political party to alter or edit the relevant party election broadcast contents and resubmit such contents to the broadcasting licensee at least 72 hours prior to the scheduled broadcast thereof.

(6) A political party must ensure that its party election broadcast contents does not -

(a) contravene any law and especially not the Constitution of Namibia, the Electoral Act or the Act (including this Broadcasting Code); and

(b) contain any material which is calculated, or which in the ordinary course is likely, to provoke or incite any unlawful, illegal or criminal act, or which may be perceived as condoning or lending support to any such act.

(7) A political party submitting its party election broadcast contents to a broadcasting licensee for broadcasting -

(a) has no claim against the broadcasting licensee arising from the broadcast or failure to broadcast such contents; and

(b) is deemed to have indemnified the broadcasting licensee against incurred costs,

damages, losses and third political party claims arising from the broadcast thereof.

- (8) A broadcasting licensee broadcasting a party election broadcast contents must -
  - (a) make available to all political parties, every day throughout the election broadcast period, four time-slots not exceeding two minutes each as a minimum;
  - (b) do so in accordance with and subject to this Broadcasting Code and such additional requirements as the Authority may determine under the Act;
  - (c) ensure that all party election broadcasts aired by such licensee are clearly identified; and
  - (d) ensure that all party election broadcasts are identified or announced in a similar manner.
- (9) A party election broadcast may not exceed five minutes in duration.
- (10) A broadcasting licensee may not broadcast a political party's party election broadcast or political advertisement immediately before or after another political party's party election broadcast or political advertisement.
- (11) Unless a political party makes prior arrangements with the broadcasting licensee, party election broadcast airtime allocated to but not used by that political party shall be forfeited.
- (12) A broadcasting licensee or political party may not permit or engage in any interference with, or trade-offs in the sequence or scheduling of party election broadcasts.

### **Political advertising**

- 23.** (1) A broadcasting licensee may not broadcast, or allow to be broadcast, a political advertisements under any circumstances except during an election broadcast period.
- (2) A broadcasting licensee, to whom a political advertisement is submitted by a political party for broadcast, may not edit or alter the advertisement.
- (3) A broadcasting licensee may not reject a political party's political advertisement without reasonable cause and in such event the broadcasting licensee must -
- (a) no longer than 24 hours after having received the political party's political advertisement furnish the political party concerned with written reasons for the rejection; and
  - (b) allow the political party to alter or edit the relevant political advertisement and resubmit such advertisement to the broadcasting licensee at least 72 hours prior to the scheduled broadcast thereof.
- (4) Where a broadcasting licensee rejected a political advertisement and the political party concerned confirmed in writing to the broadcasting licensee that it will not be re-submitting the advertisement, the broadcasting licensee must, within 24 hours after receiving such confirmation, notify the Authority in writing of such rejection which notification must be accompanied by the written reasons given to the relevant political party for the rejection.
- (5) A political party, whose political advertisement was rejected and who does not accept the reasons provided by the broadcasting licensee for the rejection, may refer the matter to the

Authority within 24 hours of being informed of the rejection.

- (6) A political party must ensure that its political advertisement does not -
  - (a) contravene any law and especially not the Constitution of Namibia, the Electoral Act or the Act (including this Broadcasting Code); and
  - (b) contain any material which is calculated, or which in the ordinary course is likely, to provoke or incite any unlawful, illegal or criminal act, or which may be perceived as condoning or lending support to any such act.
- (7) A political party submitting a political advertisement to a broadcasting licensee for broadcasting -
  - (a) has no claim against the broadcasting licensee arising from the broadcast or failure to broadcast such advertisement;
  - (b) is deemed to have indemnified the broadcasting licensee against incurred cost, damages, losses and third political party claims arising from the broadcast thereof.

### **Broadcasting on polling day**

**24.** (1) No broadcasting licensee may on polling day broadcast a party election broadcast, political advertisement or any material canvassing for support of any political party or candidate.

(2) A broadcasting licensee must confine election coverage on the polling day to reports and analyses on the progress of voting and information pertaining to voting schedules and location of polling stations.

(3) A broadcasting licensee may not broadcast election results until after the polls are declared closed and official results are announced or published by the relevant officials of the Electoral Commission of Namibia in accordance with the Electoral Act.

## **PART D LOCAL CONTENT**

### **Local content objectives**

- 25.** Every broadcasting licensee must, through the broadcasting of local content strive to -
- (a) encourage the development of Namibian identity and expression by providing, within the type of programmes or music broadcast by a broadcasting licensee, a wide range of local content which reflects Namibian attitudes, opinions, ideas, values and artistic creativity by displaying Namibian cultures and entertainment through music, dramas, series, news, documentaries, current affairs, movies, films and other programmes;
  - (b) serve the needs and interests and reflect the circumstances and aspirations of Namibian women, men and children in a democratic Namibian society;
  - (c) produce and maintain local content of high standards and quality; and
  - (d) make maximum use of Namibian and African creative and other resources in the

creation and presentation of local content.

### **Local content policy**

**26.** (1) In order to promote the progressive implementation of local content in broadcasting, a broadcasting licensee must, within 12 months after the commencement of this Broadcasting Code develop, and submit to the Authority, its written local content policy in accordance with this rule.

(2) A broadcasting licensee's local content policy must include at least the following matters:

- (a) A description of the type of programmes and, if applicable, music broadcast by the broadcasting licensee;
- (b) a brief analysis or summary of the characteristics of its audience and the preferences of such audience;
- (c) based on the knowledge of the broadcasting licensee and taking into consideration the nature of the broadcasting licensee as contemplated in paragraph (a), a summary of local content available for broadcasting by the broadcasting licensee and the cost implications thereof;
- (d) the purpose or objectives of the broadcasting licensee's local content policy;
- (e) the principles of the broadcasting licensee's broadcasting policy (that is, amongst others, how the broadcasting licensee intends to promote local content in its broadcasts);
- (f) challenges identified by the broadcasting licensee in implementing local content requirements; and
- (g) any other matter the broadcasting licensee deems appropriate to include.

(3) The Authority may assist broadcasting licensees in the development of their local content policies by providing them with a sample local content policy covering the matters set out in this rule.

(4) (a) A broadcasting licensee must every year, on the anniversary of its local content policy, review the policy and, if necessary, make such amendments thereto as are appropriate.

- (b) Where amendments are made by a broadcasting licensee to its local content policy, the amended version of the policy must be submitted to the Authority as soon as practicable.

### **Local content requirements**

**27.** (1) A broadcasting licensee must, over the reporting period, during the performance period, measured as set out in rule 28, broadcast the minimum local content programmes and music as set out in this rule.

(2) The minimum local content requirements for the different broadcasting licensees are as follows:

- (a) Radio broadcasting licensees: over the reporting period, fifteen percent of music

broadcast during the performance period must be local content music;

- (b) commercial television broadcasting licensees (excluding subscription television broadcasting licensees and NBC): over the reporting period, ten percent of programmes broadcast during the performance period must be local content programmes;
  - (c) community television broadcasting licensees (excluding subscription television broadcasting licensees and NBC): over the reporting period, fifteen percent of programmes broadcast during the performance period must be local content programmes;
  - (d) subscription television broadcasting licensees: 1.5 percent of their annual revenue of their most recent completed financial year must be expended on the acquisition or development of local content;
  - (e) NBC: over the reporting period, thirty percent of programmes and music broadcast during the performance period must be local content programmes or music.
- (3) The local content requirements set out in this rule become enforceable -
- (a) for an existing broadcasting licensees, on the date of the third anniversary of the commencement date of this Broadcasting Code;
  - (b) for NBC, after a period of three years from the date determined by the Minister in accordance with section 93 of the Act;
  - (c) for a broadcasting licensee to whom a broadcasting licence was issued subsequent to the commencement of this Broadcasting Code, after a period of three years from the date of commencement of its broadcasting licence.

### **Measurement of local content**

**28.** (1) A broadcasting licensee must attempt, in so far as reasonably possible or practical, to evenly spread out the broadcast of local content, on a daily basis, over the performance period.

(2) Compliance with local content requirements shall be measured over the reporting period which is a period of 12 months.

(3) Subject to sub-rule (1), a broadcasting licensee must ensure that it meets its local content requirements measured over the duration of the reporting period irrespective of the spacing, duration or frequency of local content broadcast during the daily performance period.

(4) For purposes of measuring local content and local content requirements, the following broadcasts do not constitute music, programmes, local content music or local content programmes (which means that these broadcasts are not taken into consideration when measuring and determining local content programmes or music against other programmes and music broadcast):

- (a) News;
- (b) sport events;
- (c) games;
- (d) programme promotions, bridging and sponsorship music and a broadcasting

licensee's continuity and other announcement and theme music;

- (e) advertisements and promotions;
- (f) games;
- (g) radio and television shopping;
- (h) teletext.

(5) Where a local content programme or music is broadcast more than once during the performance period, measured over a week, any broadcast after the first broadcast thereof during that week does not count towards the local content requirement applicable to that broadcasting licensee.

(6) Based on the above, local content is calculated as follows for each performance period:

$$\frac{A}{C - B} \times 100$$

where

A = total number of hours or time the broadcasting licensee broadcast applicable local content during the performance period

B = total number of hours or time broadcasting licensee broadcast exclusions set out in sub-rule (4) during the performance period

C = total number of hours or time the broadcasting licensee broadcast programmes or music (including local content programmes and music) during the performance period

and multiplied by 100 to obtain a percentage.

### **Local content exemption**

**29.** (1) The Authority may, upon application by a broadcasting licensee, grant an exemption or deviation, with or without such conditions and for such period as the Authority may deem appropriate, from any local content requirement in this Part in the event where -

- (a) compliance would result in unreasonable and unjustifiable economic, financial or other hardship to the broadcasting licensee;
  - (b) the broadcasting licensee generally broadcasts specialised programmes or music to a particular audience and such types of programmes or music are not produced or are not sufficiently produced by persons who will render such programmes or music local content programmes or music;
  - (c) under circumstances, the local content requirements are unreasonably high for that particular broadcasting licensee;
  - (d) the Authority has determined any other criteria with regard to which an application for an exemption or a deviation may be made.
- (2) An application contemplated in sub-rule (1) must -
- (a) be sufficiently motivated on the basis of one or more of the criteria set out in that sub-rule;
  - (b) have attached thereto such additional substantiation as the broadcasting licensee



deems relevant;

- (c) if relevant, include proof that there is no or limited local content available within the context set out in sub-rule (1)(b); and
- (d) demonstrate the measures the broadcasting licensee took or intends to take in attempting to meet the relevant local content requirements.

(3) The Authority must evaluate each application based on the criteria specified in sub-rule (1) and taking also into account the capacity, cost and strength of local content production and availability and may -

- (a) refuse the application if the criteria specified are not met;
- (b) grant an exemption without conditions or with such conditions as the Authority deems appropriate;
- (c) grant such deviation as the Authority deems appropriate with or without such conditions as the Authority deems appropriate; or
- (d) make such other determination as the Authority deems appropriate under circumstances.

(4) The Authority may, out of own accord, lower any local content requirements on any of the grounds set out in sub-rule (1).

### **Record keeping**

**30.** (1) A broadcasting licensee must keep and maintain such logs, statistical forms and programme and music records as may be necessary to ensure the keeping of -

- (a) the particulars of all local content programmes or music broadcast during a performance period;
- (b) sufficient particulars as regards the producer or creator of local content to enable such licensee to substantiate it as qualifying as local content;
- (c) sufficient information to enable such licensee to calculate and submit to the Authority its statistics on, and compliance with, local content requirements; and
- (d) such other particulars as may be required by the Authority.

(2) A broadcasting licensee must, for every completed year during which this Part D pertaining to local content applied to such licensee, no later than the 31<sup>st</sup> of January of the ensuing year, submit its compliance report to the Authority -

- (a) in the format determined by the Authority; or
- (b) if the Authority did not determine a format, in such format so as to sufficiently and clearly indicate such licensee's compliance with its local content requirements.

(3) A broadcasting licensee must keep the logs, statistical forms and records contemplated in sub-rule (1) for a period of not less than 12 months after the end of each calendar year to which

they relate.

### **Supervision by the Authority and enforcement**

**31.** (1) The Authority shall supervise compliance with the Broadcasting Code, including the local content requirements, in terms of section 90 of the Act.

(2) The Authority may conduct spot checks on a broadcasting licensee, comparing such licensee's logs, statistical forms and records with its own to verify compliance.

(3) The Authority will periodically review the Broadcasting Code and specifically also the local content requirements to ensure the continued progressive implementation thereof in order to meet the objectives set out in the Concise Statement of Purposes to this Broadcasting Code.

## **SCHEDULE 3 EXPLANATORY MEMORANDUM**

### **1. Introduction**

This Explanatory Memorandum provides background, defines issues, summarises, and responds to, previous stakeholder input and comments and sets out the Authority's views. The draft Broadcasting Code, contained in Schedule 2, was first published for public comment on 18 August 2016 in Government Gazette No. 6097, General Notice No. 343 of 18 August 2016. Comment and submissions were received and, subsequent to the consideration thereof, the Authority published a revised version of the Broadcasting Code on 30 June 2017 in Government Gazette No. 6351, General Notice No 343 of 30 June 2017. Numerous comments, input and submissions (collectively called "submissions") were received, reviewed and considered by the Authority. In view of the submissions received and giving further consideration to the contents of the Broadcasting Code, the Authority publishes this revised Broadcasting Code.

Submissions received on previously published Broadcasting Codes are summarised below together with responses from the Authority.

### **2. Responses to Submissions**

#### **2.1 Editors' Forum of Namibia (EFN)**

The EFN made submissions on both the original 2016-Broadcasting Code as well as the revised version published in 2017. Relevant comments of the EFN's submissions are collectively addressed below.

##### **2.1.1 *Other instruments and self-regulation***

EFN advises the Authority to take note of international and continental best practices in media regulation and referenced some specific protocols as well as developments in self-regulation with regard to broadcasting content. The Authority took note hereof and is familiar with the referenced protocols. However, these protocols are mainly of a voluntary and over-arching nature and advocate broad-based principles. The aim of the Namibian Broadcasting Code is to regulate selected broadcasting content issues in a detailed and enforceable (i.e. obligatory) manner. The Broadcasting Code aims at giving effect to the obligations placed on the Authority in terms of section 89 of the Communications Act. Ultimately, this approach will not exclude the future application of section 89(4) to (6) and it will remain possible to grant exemptions from the Broadcasting Code under the circumstances set out in section 89(4) to (6). It is the decision of the Authority to commence with a Broadcasting Code covering the minimum of issues deemed of most importance. In deciding on its approach and the contents to be covered by the first Broadcasting Code, the Authority did extensive comparative research covering both African and international countries and also covering both developing and developed countries. As the draft Broadcasting Code regulates the minimum

regarded appropriate for a first Code, much room is left for self-regulation.

### *2.1.2 The Constitution and freedom of speech*

EFN references constitutional protection of freedom of speech and expression and the implied editorial independence and rights to self-regulation of contents. The Authority agrees that freedom of speech is a fundamental freedom protected under the Constitution. However, fundamental rights such as freedom of speech may be limited by national laws in so far as such national laws place reasonable restrictions on such rights, are necessary in a democratic society and are required in the interests of sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. It is the opinion of the Authority that the Broadcasting Code's content regulation falls fully within the limitations anticipated in Article 21(2) of the Constitution. Other jurisdictions reviewed during the drafting of the Broadcasting Code with similar constitutional protection of freedom of speech and expression, have extensive and detailed broadcasting codes considerably more invasive and prescriptive than the Namibian Broadcasting Code in which, and it is reiterated, the Authority attempted to identify the minimum regulation required to achieve the objectives set out in the Constitution and the Communications Act.

It is submitted by the Authority that the contents of the Broadcasting Code does not unduly impinge or upon or distract from rights to freedom of speech and expression and freedom of the press and other media but aims at establishing a regulatory environment where various interests and rights are balanced reasonably and fairly.

Note that the Authority, in this revised Broadcasting Code, included a broader based exemption clause thus enabling a more flexible approach which will render practicality to the perceived more stringent rules of the Code. The Authority is comfortable that the Broadcasting Code compares well with African and international counterparts as regards the contents covered therein. The Broadcasting Code is not anticipated to be an invariable longstanding instrument cast in stone. Rather, the appropriateness and efficiency thereof will be under continual review to allow for regular and timeous reconsideration and, if required, amendments.

EFN expressed a concern that a broadcasting code may negatively affect Namibia's status regarding media freedom. Once in operation, the Authority will continue to monitor the efficiency of the Broadcasting Code and its impact on the broadcasting industry to allow for timely adjustments if required. Note that all aspects and content not covered by the Broadcasting Code will remain subject to self-regulation for the time being and the Authority will continue to encourage a strong self-regulatory agent and protocol to cover such aspects and content. In this regard, comments were received from a number of stakeholders that they do not object to the general conditions in Part B of the Broadcasting Code since such practices are generally being complied with due to self-regulation and adherence to other codes with similar rules. The Authority therefore concludes that most (if not all) broadcasting licensees (including subscription television) are already compliant.

### *2.1.3 Exemption of licensees belonging to EFN/subscribing to the Constitution of the EFN*

In its submissions the EFN makes a case for exemption of their members (to whom the Broadcasting Code will apply), under section 89(4) – (6) of the Communications Act, on the grounds that such members: (a) already meet the broadcasting standards<sup>1</sup> set under section 89 (the standards are included in the EFN's Constitution); (b) EFN is able to enforce compliance thereof by members; and (c) the organisation must meet the criteria of section 89(4) et al. The EFN views exemption under section 89(4) as almost guaranteed if a licensee meets the criteria.

<sup>1</sup> EFN states that such an organisation's standards deal with "some" or "all" of the regulatory matters covered in section 89(2). However, section 89(4)'s reference to "broadcasting standards" cannot be assumed to be a reference to the list of topics in section 89(2) which can be included in a broadcasting code. It is submitted that the reference in section 89(4) to "broadcasting standards" is the broadcasting code itself and therefore section 89(4) anticipates compliance with the totality of a broadcasting code.

The Authority wishes to respond as follows to this contention:

- Section 89(4) et al is discretionary (i.e. “may”) and the Authority is authorised to exercise a subjective discretion on this matter (i.e. “if the Authority is of the opinion”);
- it is submitted that the EFN Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media (“Code of Ethics”), although similar in many aspects, do not cover the exact same subject-matter in the same manner as proposed in the Broadcasting Code and, where there is some over-lapping, the Code of Ethics, as opposed to the Broadcasting Code, lacks in detail. It is noted that, apart from elections and referendums, the Code of Ethics is more extensive than the Broadcasting Code which is commended. However, the Code of Ethics specifically states that coverage of elections and referendums must comply with the requirements prescribed by the Authority – i.e. the Broadcasting Code and thus acknowledges the need for additional regulation;
- it still needs to be determined, for purposes of section 89(5), whether a substantial percentage of licensees belongs to, or subscribes to, the EFN and its Constitution which, according to clauses 1 and 6 thereof, is limited to senior print and electronic media editors (i.e. persons and not necessarily entities as such) – according to clause 6 to senior editorial executives. In terms of clause 6.1.4 membership is voluntary and members belong to the EFN in their individual capacity. Should future application for exemption be made, these are matters which will require further attention;
- once the Broadcasting Code commences, licensees belonging to the EFN can at any time approach the Authority for exemption under section 89(4) and, in this regard, the Authority recognises the prerogative of EFN members to submit such request;
- section 90 of the Communications Act contains enforcement mechanisms in the event of non-compliance with the Broadcasting Code. Both voluntary and compulsory enforcement mechanisms are stipulated. Section 89(4) requires an institution to be exempted from a broadcasting code to be able to “enforce” compliance by its members with its broadcasting standards. The EFN Constitution, amongst others, provides for: (a) encouraging self-regulation in respect of grievances and complaints (voluntary); suspend, expel or terminate a member’s membership (compulsory). Note is taken of compliance mechanisms build into the EFN Constitution and Code and, should a future request for exemption be submitted, these will be thoroughly considered. As regards the role of the Media Ombudsman, note is taken that it has adjudicated many cases amicably including cases involving non-members who would voluntarily submit to such dispute resolution mechanisms thus falling short of the enforcement requirement stated in section 89(4);
- In conclusion, the Authority supports a robust additional Code of Ethics based on, amongst others, self-regulation to operate supplementary to, and in conjunction with, the Broadcasting Code.<sup>2</sup>

#### *2.1.4 Local content requirements*

The EFN objected against the inclusion of specific percentages to be met with regard to local content and deemed it inappropriate. The local content provisions in the Broadcasting Code have shown to be probably the most topical aspect of the Code and most stakeholders commented on the local content requirements. As will be noted from the revised Broadcasting Code, the Authority considered all stakeholder input and, while keeping the principle of promoting local content and requiring a minimum amount of local content intact, decreased local content requirements. The Authority submits the following motivation and principles for the local content requirements:

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<sup>2</sup> A stakeholder commented that the Authority should make it compulsory for licensees to have EFN membership. As EFN is a voluntary organisation, there would be substantial challenges in making such membership compulsory in addition to the issues addressed above.

- Local content requirements in the broadcasting industry in order to promote local programmes, music and artistic expression are commonplace;<sup>3</sup>
- countries with large and highly developed broadcasting and production sectors easily displace the local sectors of smaller, less-developed countries (in Malaysia, for example, a thirty minute USA programme cost US\$ 1,500 whereas local production cost for a similar programme can be about US\$ 20,000);<sup>4</sup>
- in terms of international protocols local content is recognised to align with freedom of expression and the promotion of cultural rights where such local content requirements: promote diversity and pluralism, are implemented by appropriate legislation, are realistic, practical and align with local circumstances and needs, recognise the differences between different types of broadcasters (for example radio versus television and subscription television) and specialised broadcasters (i.e. broadcasters targeting special programmes not linked to local production), allow for a phasing in period and implemented progressively;
- local content requirements are therefore a recognised and acceptable means by which to promote local programmes and production;
- States which are members of the Council of Europe and the European Union are required under the Convention on Transfrontier Television and European Union Council Directive 89/552/EEC to reserve the majority percentage of transmission time for European works which includes local production of the relevant State;
- in most countries having a local content requirement, local content generally means programmes or music produced by or under the creative control of citizens of the relevant country;
- many countries follow a layered approach with regard to their local content model which includes measuring local content requirements within specified time periods (hourly, daily, weekly, monthly, quarterly or annually);
- local content requirements are periodically reviewed and progressively build upon.

Based on the above principles, the Authority proposes a local content regime based on the following principles:

- As the purpose of local content requirements is to support the local industry as well as Namibian expression, work by Namibian citizens (whether or not resident in Namibia) as well as persons permanently resident in Namibia will qualify for local content;
- the same applies to Namibian music. Having considered stakeholder input, the Authority now proposes wider definitions for local content;
- the performance period will remain 126 hours per week (measured daily between 05:00 hours and 23:00 hours) to ensure the broadcasting of local content during a period attracting more listeners;
- local content will include Namibian music for all broadcasting licensees (i.e. radio and television), however, for radio broadcasting licensees, local content will be limited to local content music only;
- sport coverage, news, advertising, games, promotions and certain announcements broadcast during the performance period will be excluded (i.e. deducted) from the total performance period's hours and the local content percentage will be calculated on the remaining hours. This means, for example, local content music required to be broadcast will be measured against only the total other music broadcast during performance period – not against the total number of hours of the performance period thereby reducing local content burden;

<sup>3</sup> In researching local content, the Authority studied, amongst others, the local content models as applied in: Canada, Nigeria, Australia, Bulgaria, South Africa, Hungary, Poland and Sweden. It is interesting to note that even a populated country with a well-developed entertainment and production industry such as Canada considers the protection thereof by means of local content requirements necessary.

<sup>4</sup> Ken Bhattacharjee and Toby Mendel, Local Content Rules in Broadcasting, March 2001

- local content requirements will be as follows: radio – 15% local content music; commercial television – 10% local content programmes and/or music; community television (excluding subscription television) – 15% local content programmes and/or music; NBC – 30% local content programmes and music; and subscription television – 1.5% of annual revenue to be expended on the acquisition and/or development of local content programmes or music;
- the phasing in period will remain three years from date of commencement of the Broadcasting Code but provision is now made for broadcasting licensees to develop an abridged local content policy within twelve months after commencement of the Broadcasting Code;<sup>5</sup>
- inclusion of a general exemption or variation clause – i.e. based on the criteria specified in the local content rules, a broadcasting licensee can apply for exemption or a variation of applicable local content requirements. Also, exemption provision is made for broadcasting licensees targeting special programming have little to no connection to local content (cultural) production;
- record keeping requirements were simplified and must only be submitted after the first full calendar year once the local content requirements become compulsory;
- provision is made for the Authority, out of own accord, to review and vary local content requirements.

### 2.1.5 *EFN's substantive comments on the broadcasting code's content*

The EFN provided valuable substantive input on specific provisions of the Broadcasting Code. The Authority considered the input and, where deemed appropriate, revised certain rules. As regards comments received on previous proposed rules on advertising, the Authority removed them and will revisit more substantive regulation of advertising during a future review of the Broadcasting Code.

## 2.2 MultiChoice Namibia

MultiChoice made submissions to CRAN on the Broadcasting Code on 5 September 2016 and again on 31 July 2017.

### 2.2.1 *Non-compliance with section 89(3)*

MultiChoice opines that the Broadcasting Code does not comply with the requirements of section 89(3) of the Communications Act especially as regards ensuring that duties imposed on a specific category of broadcasting services are appropriate for the services in question. Amongst others, MultiChoice argues that it has limited to no editorial control over the contents of channels and programmes forming part of its services within a multi-channel re-broadcasting of multiple thematic channel environment. MultiChoice specifically states that it does not create contents or channels and does not have editorial control over contents and channels.<sup>6</sup> Reference is made to subscriber and parental control enabling self-regulation by subscribers – i.e. self-regulation by subscribers as opposed to an enforceable broadcasting code.

The Authority takes note of the mentioned constraints. Where appropriate, specific exemptions are now included in the Broadcasting Code. Additionally, a new rule is included providing for exemption or deviation applications where it would be unjustifiably harsh or unreasonable for a broadcasting licensee to comply or where a broadcasting licensee cannot comply due to lack of editorial control ~~with a specific rule thus allowing~~ for flexibility and adaptability if substantiated.

<sup>5</sup> The purpose of such policy, amongst others, is to get licensees, already in the phasing in period, to begin thinking how to deal with and implement local content requirements, open communication between licensees and role-players on local content production and identify any challenges there may be. It is a low level policy, not to unduly burden licensees, and the Authority may assist in providing a sample policy to industry.

<sup>6</sup> Due to these characteristics MultiChoice states that it cannot comply with requirements relating to news and current affairs, sexual conduct, protection of children, violence and hate speech, privacy, dignity and reputation, audience advisories, controversial issues of public importance, competitions and audience participation, public notices of emergencies or public disaster announcements, coverage of elections and referendums and recordkeeping.

### 2.2.2 *Local content requirement*

For the reasons given, MultiChoice states that it cannot comply with minimum percentage required for local content (i.e. 15% of its acquisition budget) and argues that it is inappropriate to the nature of their services and will render their services uneconomical. The requirements to keep the specified information on local content are found unreasonable and uneconomical. MultiChoice opines that local contents requirements should apply to public broadcaster and their choice to provide local contents should be a commercial decision. As an alternative, MultiChoice proposes an annual fixed amount to be expended on local contents namely N\$ 4 million. MultiChoice finds the definition of local contents too narrow and advocates additional inclusions such as sports and advertising to count towards local content. Additionally, MultiChoice argues in favour of the same grace period (i.e. three years) to become compliant with local content requirements.

The Authority considered MultiChoice's input on local content and accommodated such input as follows:

- See the above proposals on local content with regard to the EFN submissions which address many issues also raised by MultiChoice;
- to be meaningful and achieve its objectives, the local content model cannot be limited to the public broadcaster only – however, the local content model distinguishes appropriately between public broadcasters vis-à-vis commercial and community broadcasters and acknowledges their different roles and circumstances;
- in order to address the unique position of broadcasting licensees offering subscription services, the model proposes that subscription television broadcasting licensees spend 1.5% of their annual revenue on the acquisition and/or development of local content programmes or music;
- it is common to exclude sport programmes/coverage, announcements, news, advertisements, competitions and the like from local content requirements – a reason for this being that much of the latter content often constitutes foreign content and may place too stringent requirements on broadcasting licensees (for example, in a small country such as Namibia, requiring that a specified percentage of sport programmes must be local content may be arduous to comply with in view of the demand to show regional and international sport events). However, these exclusions are now proposed to be deducted on both sides (i.e. they do not count towards the total content against which local content is measured and neither do they count towards local content).

The Authority feels comfortable that the revised local content requirements will serve well as an entry-level local content regime for Namibia, that requirements stated are reasonable and practical and can be complied with in a flexible regulatory environment.

### 2.2.3 *Alternative rules and standards for subscription broadcasting*

Due to the nature of its services, MultiChoice argues for: (a) separate rules, code and/or standards for subscription broadcasting licensees;<sup>7</sup> (b) lighter touch regulation with more emphasis on subscriber choice and control. MultiChoice thus advocates a specialised code specifically catering for the unique features of subscription broadcasting.

The Authority considered concerns expressed regarding the suitability of the Broadcasting Code to apply equally to all broadcasting licensees. Where clearly not suitable to subscription broadcasting licensees, specific exemptions were provided. Provision was not made for exemptions where the

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<sup>7</sup> MultiChoice submits that channel suppliers do not allow MultiChoice to make changes or insertions without their consent (the latter being in any event unusual). This statement acknowledges that such changes and insertions can be made. However, according to MultiChoice to be able to do this will require substantial technical equipment, money and time.

Authority is of the opinion that a rule is of a nature and gravity that all broadcasting licensees should comply therewith (if they are not already doing so). However, to render the Broadcasting Code more flexible and practical and to be able to address a situation where compliance would not be feasible or possible, a general exemption rule is inserted in the Code. This will allow licensees to apply to the Authority for an exemption or variation and the Authority may, on good cause shown, in its discretion, with or without conditions, exempt, temporarily exempt or vary the rule depending on circumstances.

### 2.3 HitRadio

HitRadio commented that radio stations cater each for its own unique audience. If their audiences are not partial to 50% of local music, they will migrate to grey solutions. Radio stations will lose listeners and subsequently advertising revenue. The Authority took note of these concerns and the revised proposals on local content (as explained above) aim at addressing these concerns. The Authority wishes to point out that the intention is not to force broadcasters to broadcast specific local content which may not fall within the characteristics of a specific broadcaster. Rather, the intention is for broadcasters to locate and promote local content within their specific type of broadcasting. For example, if a broadcaster focusses on classical music (which assume, for purposes of this example, is not produced in Namibia in abundance), the intention is not to force such broadcaster to air jazz (which may be abundant in Namibia). In such event, if the broadcaster can show it made reasonable efforts to locate and/or promote local content within its field, it is able to apply to the Authority for exemption or a lower percentage.

### 2.4 Other Stakeholders

Valuable input was received from other stakeholders all of which the Authority considered even if not addressed specifically. In addition, there was overlapping in comments and thus similar comments made by other stakeholders already addressed above, are not addressed separately. As regards local contents, comments were received that -

- it would be challenging to obtain the minimum % of local contents required in the Namibian market since there is not sufficient production in the local market, much of which is still in infancy stage with limited selection/variety for audiences' specific preferences;
- it would be quite costly for licensees to meet the minimum % proposed;
- the duty to broadcast local content should rest on the public national broadcaster as, amongst others, it can be funded from taxes/public funding;
- commercial broadcasters aim at providing content demanded by their audience and content is thus demand driven and not in the sole discretionary prerogative of the broadcaster (whether voluntary or compulsory);
- coverage of local sporting events and locally produced advertisements should count towards local content;
- as the Namibian music industry is still developing with limited recording artists, professional recording studios and genres, broadcasting licensees will all use the same contents and will all sound the same thus limiting audience choice and suppressing originality and distinctiveness;
- local content record keeping requirements are too onerous and will require additional spending/come at additional cost to broadcasting licensees;
- the promotion of local content is generally supported but on less stringent terms or quotas;
- distinction should be made between local content requirements for television and radio especially in view thereof that it is considerably more expensive to create local contents for television than for radio;
- local content requirements/quotas for subscription/commercial/community broadcasting licensees which are more stringent than those set for the national public broadcaster are deemed unfair/unreasonable and not supported;



- commercial and community broadcasting licensees do not have sufficient resources, capacity or funding to comply with the proposed local content percentage and/or to create/develop local content themselves – most make use of licensed contents as the cost of procurement thereof is significantly lower than commissioning new content.

#### 2.5 Local content record keeping requirements

The Authority reviewed the record keeping requirements and attempted to simplify them to ensure that burden placed thereby on broadcasters is not too onerous and require expensive additional manpower. The record keeping requirements are now less prescriptive and leaves increased choice to the broadcaster as what would be the most efficient manner for it to keep records and the type of information to be kept.

### 3. **Conclusion**

The Authority believes that the revised Broadcasting Code, as contained herein, is compliant with section 89 of the Act (and specifically also with subsection (3) thereof) and duly recognises and/or accommodates duties appropriate to relevant services provided by broadcasting licensees. The Broadcasting Code is deemed not to result in uneconomical or impractical services but at the same time in a practical manner promote Namibian creativity and local content.

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