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20 July 1993

Ms Amanda Armstrong
Chairperson
The Technical Committee on the Independent Media
Commission and the Independent Telecommunications Authority
KEMPTON PARK

Dear Ms Armstrong

The SABC Board would like to bring to your attention the fact that it did not have adequate time to react as comprehensively as it would have liked to the proposed IBA Bill. Whilst appreciating the opportunity to comment, the Board feels that it had been forced to react over-hastily to a matter of national importance.

The SABC's reaction to the content of the Bill should thus be seen against this background.

Yours sincerely

W J J HARMSE
GROUP CHIEF EXECUTIVE

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**SUBMISSION BY THE BOARD OF THE SABC TO THE TECHNICAL
COMMITTEE ON THE INDEPENDENT MEDIA COMMISSION AND
THE INDEPENDENT TELECOMMUNICATIONS AUTHORITY ON
THE FOURTH WORKING DRAFT OF THE INDEPENDENT
BROADCASTING AUTHORITY BILL**

1. INTRODUCTION

- 1.1 The Board of the SABC welcomes and supports the principle of the establishment of a Regulatory Body for the Broadcasting and Telecommunications industry in South Africa as contained in the draft legislation.
- 1.2 The Board recognises the need for the reregulation of broadcasting in the country and supports the introduction of an independent Authority to deal with this complicated and involved matter.
- 1.3 As the controlling body of the largest and most dominant broadcaster on the South African scene, the Board also realises that deregulation will have its most profound effect on the SABC as it is presently constituted. Consequently the Board respectfully submits its views on the proposed legislation for consideration by the Multi Party Forum or Negotiating Council.

2. GENERAL COMMENTS

- 2.1 The basic thrust of the Bill is not clear - is it based on free market principles or on "developmental needs"? This lack of a clearly defined policy statement leads to a certain degree of ambiguity, for example Chapter 2 and the resulting Chapter 7. This problem will also affect the implementation of the eventual act. The Board holds the view that the developmental needs of South Africa and its people should be paramount.
- 2.2 The position of the SABC as the country's National Public Broadcaster should be clearly defined in the Bill by means of a specific definition for the National Public Broadcaster as opposed to those of the three categories of broadcasting identified in the present draft, i.e. private, public and community.

- 2.3 The SABC as the National Broadcaster would have the primary obligation to provide a public broadcasting service in the form of educational, documentary, actuality, news and cultural programming. However, this obligation would not preclude a national broadcaster from broadcasting commercial and entertainment programming as well. The status of the SABC should thus be specifically addressed, preferably by means of a separate section. The condition for its continuous existence should be clearly stated. The role of the Minister in the Broadcasting Act should also be reviewed in the new Act.
- 2.4 The Bill should be clear on continued sources of financing for the SABC as the National Public Broadcaster in view of the projected loss of commercial income in a deregulated environment. Protection should be provided for the National Public Broadcaster.
- 2.5 The definitions for the categories of broadcasters defined in the Bill, namely private, public and community need to be reconsidered. The distinction in the Bill is based basically on revenue generation (sale of advertising time, subscription fees; licensing and state allocations); whereas another crucial distinction should be one of ownership and control. The following should be added to the definitions:
- A "private broadcaster" would be owned and controlled by individuals or organisations divorced from the State.
 - A "public broadcaster" would be a statutory body and would be part of the national infrastructure. The question of the Transkei, Ciskei and Bophuthatswana broadcasting corporations would need review, and would in all likelihood also fall into this category, either as separate units, or as extensions of the SABC.
 - A secondary distinction then needs to be made between a private broadcasting service and a public service broadcaster. Private broadcasting permits private entry into the market for profit. A Public Broadcasting Service is generally understood to comprise four elements :
 - * **Independence** : a public body with a high degree of financial policy-making independence from both governmental and commercial sources.

- * **Programme balance** : a statutory requirement to educate, develop, inform and entertain the audience. This is translated into a commitment to balanced scheduling across the different programme genres. Thus, one institution is required to cover the broad spectrum of needs and tastes.
 - * **Geographic balance** : a service provided to the whole of the (national) audience, regardless of geographic distribution, in return for a basic, initial fee usually in the form of an annual licence.
 - * **Impartiality** : political output is obliged to be balanced, impartial, distanced from all vested interests, particularly those of the government of the day.
- The definitions of all three categories of broadcasting services should include a stipulation that a licence can be issued for either national, regional or local coverage.
 - A "Community Broadcasting Service" should also be allowed to exploit commercial opportunities. These services should not have any detrimental effect on commercial revenue of other broadcasters.

If these distinctions were adopted, much of the confusion which presently exists within the definitions as they now stand in the Bill, would be obviated.

In the case of community broadcasting, clarification of the concept "non-profit entity" is necessary. It is suggested that any profits made should be ploughed back into the broadcasting organisation itself. Thus the definition needs to take note of the distinction between personal gain, and long-term organisation viability in its notion of "profit".

The rest of the Bill should be amended to incorporate the above changes of the definitions.

- 2.6 A clear statement on aspects such as access to the broadcasting spectrum, free speech, democratic values (other than free speech) e.g. non-sexist, non-racist values, are missing. There should either be a reference to these aspects as (one would expect) they will be stated in the new constitution or a "bill of rights", or the Act on broadcasting should address these matters. No mass-media system can function in an undefined larger social system or social vacuum. Chapter 2 should leave no uncertainty in this regard, e.g. will broadcasting function in a totally free market system or not ?

- 2.7 It is again pointed out that the present Broadcasting Act of 1976, needs to be replaced by a "SABC Act" simultaneously with the promulgation of this Bill to avoid overlapping and confusion.

The rest of this document contains the comments on specific sections of this Bill and reads as follows :

CHAPTER 1 : INTERPRETATION

1. Definitions

See General Comments for the Board's view on the definitions of the categories of Broadcasting Services.

"Overlap area" - the wording does not effectively describe this definition.

"Television Broadcasting Service" - Delete the words "and includes a subscription television broadcasting service."

CHAPTER 2 : OBJECT & POLICY

2. Object of Act

This is too vague, e.g. "public interest" needs to be defined.

The basic thrust of the Bill is not clear - is it based on free market principles or on "developmental needs"? This lack of a clearly defined policy statement leads to a certain degree of ambiguousness, for example Chapter 2 and the resulting Chapter 7. This problem will also affect the implementation of the eventual act. The Board holds the view that the developmental needs of South Africa and its people, should be paramount.

3. Policy

Footnote 4

The word "shall" should only be used if the policy can under all circumstances be put into practice or given effect to.

(1) Please replace the word "information" with the words "news and other forms of information".

(3)(a) "National Identity" should be defined.

As it now stands, 3(1) does not take 3(3)(a) into account and vice versa.

(3)(c) Please add a (3)(c): "comply with prescribed technical specifications".

(5) The application of this sub-section should be changed according to the new definitions of private and public broadcasting services.

(5)(a) Delete the word "each".

(5)(c) This paragraph should rather read "the need for the distribution of educational programmes".

(6) This should rather read: "ensure that broadcasting services in the Republic is not controlled by foreign persons".

(8) This is too vague.
Another view is that this policy statement is much more lenient than the provisions in chapter 7. The latter seems to exclude "all" possible forms of concentration while this sub-section has "over"-concentration in mind. Re-phrasing is needed.

(11) Delete the word "strive".

What is the reverse of the "limit of interference with commercial activity of a broadcasting service"? What about interference in the national and public broadcasting spheres? This should be addressed in clear terms

(12) How will "competition between all broadcasting licensees" affect the national and other public and community broadcasting services?

(14) This is, as a policy statement, an over-statement when compared with the restrictions in chapter 6.

(15) Does section 15 cover both national and local broadcasting services? Either define "prevailing community attitudes" or add a noun like "majority". As it now stands section 15 gives the impression of one over-riding set of attitudes, which is not the "prevailing" situation.

This section should also provide for prescribed technical specifications to enable the IBA to take action against licence holders who do not comply with such specifications.

CHAPTER 3 : INDEPENDENT BROADCASTING AUTHORITY

5. Constitution of the Authority

(1) Should the 3 year period stipulated in section 7 be negotiable, the members (except perhaps the Chairman) of the Authority should rather be part-time, taking into account the important practicality that full-time appointments may seriously inhibit and restrict appointments (availability) insofar as, inter alia, stature, experience and professionalism are concerned.

Schedule 1 is not practical. The process of appointment should be simplified. One must be cautious not to implement an Act for an interim phase, but to rather look at long-term objectives.

- (2)(b) Add the following words before the word "qualifications":
"technical, broadcasting, financial and legal". It is otherwise not clear what the nature of the members' "qualifications, expertise and experience" is.
- (2)(c) Something of this nature is needed in the "object" and "policy" in chapter 2.
- (3) The word "chairman" in the second line should also read "chairperson".

6. Persons disqualified from being members of the Authority

- (a)-(e) Provision should be made for the situation where persons who are disqualified under these paragraphs shall no longer be, once such a person's situation has changed.
- (d) Add "or printed media" at the end of the sentence.

7. Term of Office of the member of the Authority

- (2) The term as stipulated in this sub-section is insufficient. It should simply state that sufficient continuity must be ensured so that the terms of not more than two members of the Authority's shall expire simultaneously.

10. Powers and Functions of the Authority

- (2)(g) This should be rephrased to make clear for which purposes donations can be made.

14. Funds of Authority

- (1)(c) Add at the end of the sentence "excluding sources with a material interest in broadcasting".
- (4) It is unacceptable that the Authority may invest money in any manner it deems fit. There should be specific guidelines as to how money should be invested in an acceptable way.

Provision should be made that the Authority may have a contingency and/or reserve fund for future use.

17. Rules by Authority

This Bill should allow for provisions on voting, voting rights of the Chairperson, etc.

- (2) The rules should rather be made public.

19. Restriction on use of name or description implying connection with Authority

(2) What is the fine?

21. Delegations

(3) This is unclear and ambiguous and could be interpreted to be constitutionally impossible.

CHAPTER 4 : COMMITTEES, APPOINTMENT OF EXPERTS AND INQUIRIES

23. Constitution of Standing Committees

While it is acceptable that the Authority can appoint members of the Standing Committees, there should at least be some form of access by the public to nominate members.

26. Appointment of Experts

(1) Add, after "may appoint", the words "or contract".
There should be specific provisions stating that certain experts may be seconded from other organisations (such as Telkom, the SABC or a university etc.) to assist the Authority on a temporary or prolonged basis.

CHAPTER 5 : BROADCASTING FREQUENCY SPECTRUM MANAGEMENT

28. Assignment of the Broadcasting Services Frequency Bands

(1) The Radio Act, 1952 should be amended so that original powers can be delegated to the Authority in this Bill.

30. Designation of Licence Areas

(1) & (2) The word order in both these sub-sections should be changed so that the Gazette's role is clearer.

(2) & (3) It is not clear what the intention is of these sub-sections. One realises that population density is important when considering the area of a broadcasting licence, but other demographical factors should also be taken into account. What would happen if the population density changes in the course of time as a result of for instance urbanisation or depopulation? Section 30 should rather read that the Authority "may take demographic, population density and other geographical conditions into consideration when determining the service area of a broadcasting licence". Geographical factors such as mountainousness, which obstructs signal distribution, and language distribution should surely also play a role.

31. Frequency Allotment Plan

- (4)(c) This section should be incorporated into the "object" and "policy" in chapter 2.

CHAPTER 6 : BROADCASTING SIGNAL DISTRIBUTION LICENCES

33. Provision of Broadcasting Signal Distribution

- (2) Add the words "to all licensees" after the words "common carrier" in the third line.

The Board suggests the following sections 35 and 36 :

35. Criteria for Broadcasting Signal Distribution Licence

The provisions of section 43 (2), except sub-section (i), should mutatis mutandis apply to broadcasting signal distribution licences.

36. Conditions of Broadcasting Signal Distribution Licence

- (1) A broadcasting signal distribution licensee shall;
- (a) comply with all the relevant provisions of this Act, in particular the frequency plans and regulations of the Broadcasting Spectrum Management Committee; and all relevant technical specifications;
 - (b) not provide broadcasting signal distribution services to broadcasters not licensed by the Authority;
 - (c) take due cognisance of the environmental impact of its activities and comply with the applicable Acts;
 - (d) allow inspection of its facilities by the Authority;
 - (e) be allowed to hold licences other than broadcasting signal distribution licences;
 - (f) be allowed to provide broadcasting signal distribution services internationally.

The new section 37 would be commented on once written.

38. Term of Broadcasting Signal Distribution Licence

The term of seven years seems too short. The Board proposes a term of fifteen years, based on the capital investment required and the amortization of equipment.

CHAPTER 7 : BROADCASTING LICENCES

It should be specified in Chapter 7 that the Authority can specify the area of coverage, maximum allowable radiated power from an antenna, radiation pattern of an antenna, locality and even the height of the broadcasting mast of an antenna in the broadcasting licence. Should a broadcaster be able to use unlimited radiated power or direct broadcasts in any direction, he would be able to exceed the area of coverage of his broadcasting licence and could cause deliberate overspill into neighbouring areas. The Authority should be able to force a holder of a broadcasting licence to reduce its radiated power until it doesn't exceed the allowable area of coverage. (Without this, other broadcasters in neighbouring areas will complain about the excess of the area of coverage).

40. Prohibition on the provision of a broadcasting service without a broadcasting licence

Replace "sound" broadcasting service with "radio" broadcasting service, here and elsewhere. "Sound broadcasting service" may also include music played on the beach or on campus, which is clearly not the intention of this Bill. Also, if "sound" is to be used instead of "radio", then "sound and vision" should be used in place of "television". By using the term "radio" and "television broadcasting service", the meaning of the Bill will be clear.

41. Granting and Renewal of Broadcasting Licences

A specific section describing who may apply for a broadcasting licence should be included. This section does not categorically express this.

Section 41 should not be applicable to the SABC as the National Public Broadcaster. This should, however, be specifically stated, as the SABC have a statutory mandate which it must obey.

- (2)(b)(i) Change the word "frequency" to "technical parameters", as the term "frequency" could become too restrictive with new technical developments.
- (2)(c)(ii) This section should be aligned with Section 41 (11) in respect of renewal of applications for licences.
- (2)(f) It is not clear why the Authority must only grant opponents of applications for licences a right to make representations and a hearing. Granting a similar opportunity to supporters of applications for licences also is likely to offer the Authority a more balanced picture of the needs of communities. The practical implications of this suggestion should be worked out by the Authority.

Footnote 8

The fact that interested parties can comment on this Act should suffice. The Board therefore supports the view that the independence of the Authority should prevail.

(15) Also add the following to this sub-section:

"The Authority may levy such fees for a broadcasting licence as it deems fit, including levies to assist in the financing of Public Broadcasting Services and which the Authority can make available to Public Broadcasting Services in a manner and for specific purposes as it deems fit".

43. Private Broadcasting Licences

(2)(h) This kind of provision is strange to appear in an act. It should rather be in a Bill of Rights.
The provision for this need is adequately covered by section 3(7).

45. Limitations on Foreign Control of Private Broadcasting Services

(1) This section is not clear. What is meant by "to exercise control"? Does this mean financial or managerial control? If it is the latter, then one could object, as much expertise in this field is "imported".

(3) At the end of the sentence, please add "in total".

(4) Footnote 10-A solution may be found in restricting foreign ownership of specific broadcasting services.

(4) Another view is that this section can be supported as an interim measure. Experience will determine whether or not a change is desired.

46. Limitations on the Control of Private Broadcasting Services

Footnote 11 - While some limitations should be set the "third view" is relevant, since very little is said in the Bill re the costs and its implications on broadcasters, as well as the effects that technological developments may have.

(2)(a) The legislation should be designed to cover the future, the 21st Century, and include all "contracted audio reproduction", including digital transmission and new technology developments.

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47. Limitations on Cross Media Control of Private Broadcasting Services

(5) & (6) - It is not clear what the difference is between these two sub-sections.

(7), (8) and (9) - Please replace "more than one" with the word "a" and delete the word "private". Please add the word "any" before the words "company interests".

It is not clear what the difference is between the above three sub-sections and they should rather be combined into one sub-section.

It is also not clear what the difference is between sub-sections (10), (11) and (12) and they should also be combined.

(10) The percentage should be based on International Standards. The SABC proposes a figure of 20%.

The limitations on cross media control is unsatisfactory. The detail specifications should rather be determined by the Authority. This Bill should state that no broadcaster may operate in more than two of the 3 types of "media": radio, television and printed media. An important intention of this Bill is to maximise the amount of voices on the air; it can only be done by restricting the current media magnates and to prevent them from getting further broadcasting licences.

An exception may be allowed for in the cases of a licensee whose service is restricted to a specific rural area. This can be legislated by way of regulation by the Authority on the basis of community needs.

Furthermore the whole of section 47 is bedevilled by the question of "what is a newspaper". The opening definition states (in tautological terms) "a newspaper means a newspaper which is published once a week". Again, this Bill is silent on the ownership of the newspaper. Since it is one of the stated aims of the bill to "prevent the over-concentration of media ownership and control", and that this provision specifically "sets out the limitations on cross media control of private broadcasting services", this omission is crucial. The legislation discusses newspapers in terms of their circulation within broadcasting licence areas. This point takes its inspiration from the American Federal Communications Commission licensing provisions. However, this assumes a diversity of newspaper ownership, an assumption which is contradicted by the high degree of monopoly ownership and centralised control within the South African press. To take a case in point: in terms of section 47(4), the major newspapers which are associated with the licence area of Greater Durban Functional Metropolitan area would be the Daily News, Natal Mercury, and the Sunday Tribune. All of these are owned by Natal Newspapers (NN), and therefore anyone in the position to control NN would be excluded from "exercising private control of a private broadcast licence" in the area. However, NN is also part of the Argus Group of newspapers. What is not clear from the legislation is whether the restriction on broadcast licensing in this area extends to all newspapers circulated within a particular licence area. Section 47(6) goes some way to specifying the question of cross ownership. Would this provision then be wide enough to exclude the possibility of cross ownership between the Argus Group as a whole and a commercial broadcasting licence in the Durban Metropolitan area?

- 45,46 & 47 - In summary it is clear that in the consideration of cross ownership, numbers as a sole criterium is unacceptable. It is suggested that geographic and other forms of diversity, dominance, status and leading role in the area, should be key factors in determining whether or not a licence should be granted. A further limitation regarding cross ownership could be a stipulation that any newspaper, newspaper group or publisher which has more than a certain percentage (say 15 - 20%) percent shares in any television or radio broadcasting service, may not have another broadcasting licence or a share in one, whether direct or indirect.

49. General Broadcasting Licence Conditions

Please add in the third line after the words "the provisions of this Act" the following:

"or in the case of a Public Broadcasting Service, then its Act".....

50. Specific Broadcasting Licence Conditions on Local Television Content and South African Contemporary Music

Footnote 13

This provision is not superfluous and the opinion is therefore supported that section 50 should definitely form part of this Bill. The policy obligation in section 3(14) is too vague so that detail provisions are necessary.

Section 50, however, is too prescriptive and over-regulated. Adequate provision is made in section 50(1) & (2) and sub-sections (3) & (4) should be deleted.

- (1)(a) Replace the words "sports programmes" with "transmissions of sports events and compilations thereof" and delete the words "game shows".
- (1)(a)(v) Add in the third line after the words "prescribed by the Authority", "in the person's broadcasting licence".
- (2)(a) & (b) As it stands, this section offers many pitfalls. What will happen if the gross revenue is so small that the minimum percentage is not enough to cater for the minimum percentage of local content? Will the particular licence then be revoked?
- (3) Such a prescribed percentage should at least take into account aspects such as quality, popularity and general demand.

51. Amendment of Broadcasting Licence Conditions

- (1)(c) Does this imply that a licensee may request a change at any stage during the licence period or only at renewal. If it is at any stage, will it effect the term of the licence as stipulated in section 52
- (2) Please delete "the Chair-person" in line 2.

52. Term of Broadcasting Licence

It should be borne in mind that the SABC is under a statutory obligation to provide a service and can therefore not find itself in a situation whereby its licence has expired or is invalid.

(2) The period should rather be 15/10 years for television.

(3) The period should rather be 10/7 years for radio

(Capital investment; life-span of equipment; and training of staff are important factors).

56. Record of Programmes Broadcast by Broadcasting Licensee

(1)(b) This sub-section may cause problems with material from overseas suppliers as well as news agency contracts.

CHAPTER 8 : BROADCASTING PROGRAMMES

59. Party Election Broadcasts on Public Sound Broadcasting Services during an Election Period

Why is the section limited to Sound Broadcasting Services only? Television should be included.

Will these party election broadcasts be supplied free of charge? If so, the following should be added at the end of sub-section (3):

"provided that the public broadcasting services' financial limitations shall prevail".

* If not, norms should be laid down to prevent bigger parties with financial backing to be in an advantageous position with the result that all political parties are not treated equitably.

A new sub-section (6) should be added stating the following:

"Party election broadcasts will be accommodated outside news and news related broadcasts. Normal news norms will apply in their programmes. Election items in news and news related programmes will be subject to the editorial code of the licensee."

60. Political Advertising on Sound Broadcasting Services during an Election Period

As previously mentioned, why is this limited to Sound Broadcasting Services only? Television should also be included.

- (3) This situation is difficult to always verify.

Please add the following at the end of the sentence:

"..... and shall abide by the norms agreed upon between the Authority and the various political parties". (see * above)

61. This section should be deleted completely. In other words, party election broadcasts and political advertisements should be allowed on television, subject to an agreement between the Authority and the political parties or the IMC/Electoral Commission.

- 59, 60 & 61 These sections should be deleted. These are functions to be exercised by an independent broadcasting authority. The retention of these sections is likely to plunge the Authority into the same controversy that has vexed the SABC from time immemorial.

Why is the subject of political parties given so much prominence in this act? It is disappointing to note that no provision is made in the act for burning and pressing matters, issues such as political education, political tolerance, the language question etc., to name but a few.

Sections 59, 60 & 62 are a subtle but ominous attempt by politicians once again to wrest the media from independence for selfish motives. These sections should be deleted. Otherwise, the so-called independence of the Authority is a mockery. These sections will only serve to emasculate the Authority.

62. Equitable Treatment of Political Parties by all Broadcasting Services during an Election Period

- (1) This sub-section contradicts sections 60 and 61 by using the term "any broadcasting service".

On the surface this seems reasonable, but, does this mean a small, unproved, radical political party is to be afforded the same time as the main parties? This is a bone of contention elsewhere, and the term "equitably" should be rephrased or defined in more detail.

- (3) Delete sub-section (3) and replace it with the following:

"In news and news related programmes news norms and the editorial code of the licensee will apply, ensuring fair treatment of all political parties.

There will be a clear distinction between news and news related programmes in which news norms and editorial codes will apply, and other programmes such as special election programmes, party political broadcasts and political advertisements, in which special rules will apply as agreed upon by Authority, the political parties (TEC) and the IMC/Electoral Commission.

CHAPTER 9 - ENFORCEMENT

63. Broadcasting Monitoring and Complaints Committee

- (1) This section should be subject to the provisions of Section 57(2) as well.

67. Powers in case of a Breach of Broadcasting Licence Conditions

Footnote 20

This provision should not be debatable.

- (2) This provision should be adapted according to the new definitions of private and public broadcasting services.

68. Offences

- (2) The words "shall be guilty of an offence" should be added at the end of the sentence.

SCHEDULE 3

1. Preamble

This is too vague. What is needed, is a specific commitment to free speech in a "democracy". As it now stands, an authoritarian regime might construe the Preamble to mean, "within the confinements of", after the period.

2. General

"... to prejudice the safety of the state ..." - this is a blanket ruling, which should be qualified.

3. News

- (1) Please replace the word "objectively" with the word "fairly".

This section deals with news (as does the code of the SA Media Council, now the SA Press Council), as if it is something concrete with clear demarcated boundaries. What is needed is an approach which takes into account the arbitrary and, per definition, subjective nature of news. News is not "made" in a Court of law, neither is it manufactured to strict designs in a factory. It is a journalist's & its news organisation's re-construction of a segment of reality. In this sense, it is impossible for news reports to be "objective". The compulsory nature of the wording in this section should be replaced by words such as "as far as possible" and "... strive to ..." etc.

Also, the proposed Code is apparently copied from the SA Media Council's Code, which is itself under review of the new Press Council.

In short the IBA Code of Conduct should not set unrealistic edicts which every journalist knows is not attainable in real life news coverage.

5. Controversial Issues of Public Importance

(2) Please add the following at the end of the sentence:

"..... provided such request is within reasonable time".

SCHEDULE 4

1. In view of sub-section (3), what is meant by "person"?

The word "control" should be defined in Chapter 1.