

**Memorandum**  
**on the**  
**Gambian National Media Commission Bill, 1999**

**ARTICLE 19**  
**Global Campaign for Free Expression**

**I. INTRODUCTION**

This memorandum has been prepared in response to the Gambian National Media Commission Bill (hereafter 'the Bill') first published in 1999, which was revised and reissued for consultation in 2001.

ARTICLE 19, the Global Campaign for Free Expression, is gravely concerned about this Bill which, if enacted, would seriously restrict freedom of expression of the press in The Gambia. In particular, we are concerned about the registration requirement for 'media practitioners', the lack of independence of the Commission envisaged by the Bill and the fact that the mechanisms introduced to enforce the Code of Conduct are excessively heavy-handed. Furthermore, we are concerned about the scope of the Bill, which includes both the broadcast and print media, and could be interpreted as including the Internet and occasional publishers. As presently drafted, the Bill constitutes an unwarranted interference with the right to freedom of expression as guaranteed under international instruments including the International Covenant on Civil and Political Rights and the African Charter on Peoples' Rights and Freedoms, as well as under the Constitution of The Gambia.

**II INTERNATIONAL STANDARDS**

**II.1 The Guarantee of Freedom of Expression**

Article 19 of the Universal Declaration on Human Rights (UDHR), binding on all States as a matter of customary international law, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>1</sup>

The right to freedom of expression is also guaranteed in a number of legally binding international treaties, including the African Charter on Human and Peoples' Rights,<sup>2</sup> ratified by The Gambia in 1983, and the International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> to which The Gambia acceded in 1979. Paragraph 2 of Article 19 of the ICCPR reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Freedom of expression is among the most important of the rights guaranteed by the ICCPR and other international human rights treaties, in particular because of its fundamental role in underpinning democracy.<sup>4</sup> This was recognised by the United Nations General Assembly in its very first session in 1946,<sup>5</sup> and has been reaffirmed many times since. For example, the United Nations Commission on Human Rights in its April 2000 Session stated that "the freedom to seek, receive and impart information and ideas of all kinds ... gives meaning to the right to participate effectively in a free society."<sup>6</sup>

Likewise, the African Commission on Human and Peoples' Rights has held:

Freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.<sup>7</sup>

The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements is well-established. For example, in a recent case the European Court of Human Rights stated that:

According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the

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<sup>1</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

<sup>2</sup> African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, adopted 26 June 1981, in force 21 October 1986.

<sup>3</sup> UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

<sup>4</sup> For example, paragraphs 22 and 67 of the Vienna Declaration on Human Rights, 12 July 1993, Doc. no. A/CONF.157/23, adopted by the UN General Assembly in Resolution 48/121, 20 December 1993).

<sup>5</sup> United Nations General Assembly Resolution 59(I), 14 December 1946.

<sup>6</sup> UN Commission on Human Rights, Resolution 2000/38, 20 April 2000, Doc. E/CN.4/RES/2000/38.

<sup>7</sup> *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communications 105/93, 130/94, 128/94 and 152/96, para. 52.

demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.<sup>8</sup>

These statements emphasise that freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. Democracy can flourish only in societies where information and ideas can flow freely.

## II.2 Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”<sup>9</sup>

Because of their pivotal role in informing the public the media as a whole merit special protection. As the European Court of Human Rights has held:

[I]t is ... incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.<sup>10</sup>

This applies particularly to information which, although critical of the Government, is important to the public interest:

The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.<sup>11</sup>

This has been recognised by constitutional courts in countries around the world. For example, the Supreme Court of South Africa has recently held:

The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.<sup>12</sup>

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<sup>8</sup> *Nilsen and Johnsen v. Norway*, Judgment of 25 November 1999, para. 43.

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

<sup>10</sup> *Thorgeirson v. Iceland*, Judgment of 25 June 1992, para. 63.

<sup>11</sup> *Fressoz and Roire v. France*, Judgment of 21 January 1999 (European Court of Human Rights).

<sup>12</sup> *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168 at 175-6 (Transvaal Provincial Division).

### II.3 Restrictions on the Right to Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the International Covenant on Civil and Political Rights lays down the conditions which any restriction on freedom of expression must meet. It states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, as recognised by the Human Rights Committee. This test requires that any restriction must a) be provided by law, b) be for the purpose of safeguarding one of the legitimate interests listed, and c) be necessary to achieve this goal.

The first condition, that any restrictions should be 'provided by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.<sup>13</sup> The European Court of Human Rights, in its jurisprudence on the similarly worded ECHR provisions on freedom of expression,<sup>14</sup> has developed two fundamental requirements:

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>15</sup>

The second condition requires that legislative measures restricting free expression must truly pursue one of the aims listed in Paragraph 3, namely the rights or reputations of others or the protection of national security, public order ('ordre public') or of public health or morals.

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<sup>13</sup> *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).

<sup>14</sup> Article 10(2) ECHR.

<sup>15</sup> *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, para. 49 (European Court of Human Rights).

The third condition means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessary". The European Court of Human Rights has established that this is a very strict test:

‘[The adjective ‘necessary’] is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. [It] implies the existence of a “pressing social need”.<sup>16</sup>

Furthermore, any restriction must restrict freedom of expression as little as possible.<sup>17</sup> The measures adopted must be carefully designed to achieve the objective in question, and they should not be arbitrary, unfair or based on irrational considerations.<sup>18</sup> Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

### III. DETAILED ANALYSIS OF THE BILL

#### III.1 The Overall Approach to Media Regulation

As provided in the Long Title, the stated purposes of the National Media Commission Bill 1999 are fourfold:

- to establish a National Media Commission;
- to regulate the media;
- to provide for a Code of Conduct; and
- to ensure the impartiality, independence and professionalism of the media.

A separate statement is appended to the Bill which elaborates on this, stating that:

The Bill establishes a National Media Commission ... The functions of the Commission are clearly spelt out, chief among which is that of inquiring into complaints made against media practitioners. To this end, the Commission is given certain powers such as that of summoning witnesses to its inquiry into a complaint as well as discontinuing such an inquiry [emphasis added].

ARTICLE 19 considers that this approach to media regulation is fundamentally flawed. At least for the print media, self-regulation is preferable to a statutory system. In any case, the Commission envisaged by the Bill is a powerful quasi-judicial body, which cannot be justified as necessary in the area of media regulation. Furthermore, the Bill fails to recognise the important differences between the print and broadcast media which have led in almost all countries to a fundamentally different regulatory approach for these two sectors.

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<sup>16</sup> *Ibid.*, para. 59.

<sup>17</sup> *Handyside v. the United Kingdom*, Judgment of 7 December 1976, para. 49 (European Court of Human Rights).

<sup>18</sup> See *R. v. Oakes* (1986), 26 DLR (4th) 200, at 227-8, (Canadian Supreme Court).

The test of necessity, discussed in Paragraph II.3 above, means that where the Government interferes with the right to freedom of expression, it should choose the least restrictive means available.<sup>19</sup> Self-regulation, which is one of the least restrictive forms of media regulation, has proved highly successful in a large number of countries and allows for a more positive and promotional role for the regulator. For example, the Australian Press Council, a self-regulatory body set up by the newspaper industry, takes a broad pro-active view of its functions and concerns itself not only with investigating complaints made to it by members of the public, but also with freedom of the press issues. It frequently makes representations on behalf of the press on an array of topics such as defamation, freedom of information, privacy, and contempt of court.<sup>20</sup> There does not appear to be any reason why such a scheme could not work in the Gambia. ARTICLE 19 recommends that the Government refrain from imposing statutory regulation until the possibility of voluntary self-regulation has been fully explored.

Regardless of the above, the Commission as provided for in the Bill would be an excessively powerful and coercive body. All media practitioners must register with it, and it will draw up a Code of Conduct which will set mandatory standards with regard to the content and quality of material for publication or broadcast by the media. It will receive complaints and conduct inquiries against media practitioners, and the Bill gives the Commission strong powers of investigation, including the power to compel material without a warrant. Finally, a heavy sanctions regime will be available. A mandatory fine or licence suspension may be imposed for failure to register with the Commission.<sup>21</sup> For a violation of the new 'Code of Conduct' for media practitioners, the Commission may require an apology, issue a reprimand, and/or impose a penalty of no less than ten thousand dalasis and an order for compensation of not less than ten thousand dalasis (approximately US\$700).<sup>22</sup> Furthermore, it will be a criminal offence to insult or obstruct a member of the Commission in the execution of his or her functions, to disobey an order from the Commission, to make false statements as a witness or to refuse to be sworn in.<sup>23</sup> The Commission may issue an arrest warrant for a witness who fails to appear before it.<sup>24</sup>

This represents an excessively heavy-handed approach to media regulation. Read as a whole, it appears that the chief aim of the Bill is to control the media through the establishment of a 'National Media Commission' with quasi-judicial regulatory powers. This is confirmed in the Explanatory Note appended to the Bill, which states that the 'chief function' of the Commission will be to inquire into complaints lodged against all media practitioners. Given

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<sup>19</sup> See *Park v. the Republic of Korea*, Decision of 20 October 1998, Communication no. 628/1995 (UN Human Rights Committee).

<sup>20</sup> Information about the Australian Press Council can be found on their website: <http://www.presscouncil.org.au/>

<sup>21</sup> Section 10.

<sup>22</sup> Sections 19 and 20.

<sup>23</sup> Section 21.

<sup>24</sup> Section 14.

the penal sanctions, the investigative and fact-finding powers available to it and the fact that no appeal lies from its decisions, it would not be inappropriate to say that the Commission will be police, judge and jury in the cases before it. Such heavy-handed regulation is illegitimate in the area of media regulation and is likely to produce a 'chilling' effect leading to self-censorship. This constitutes a disproportionate interference with the right to freedom of expression under Article 19(3) of the International Covenant on Civil and Political Rights.<sup>25</sup>

It is internationally recognised that it is not appropriate for media regulatory bodies to 'police' the media. Rather, they should ensure that the sector functions smoothly by establishing a climate of dialogue, openness and trust in dealings with media practitioners. If the Commission is retained in the Bill, the punitive sanctions currently envisaged in Section 20 of the Bill should be dropped altogether. Any sanctions that are retained should not exert a chilling effect on freedom of expression and should be designed to promote redress, not to punish the media.<sup>26</sup>

The excessively regulatory approach of the Bill is further highlighted by the fact that it nowhere mentions the constitutional right to freedom of expression and the duty incumbent on the media to report on matters of public interest even if this means criticising the Government, Government departments or individual Government representatives. The over-emphasis on control and regulation in the current draft means that the Bill fails to utilise the Commission's wider potential to protect media practitioners' rights and privileges in the execution of their professional duties, to ensure the impartiality and independence of the media, and to promote professional standards. This could build on the current draft of Subparagraphs (a) and (g) of Section 5 of the Bill, which state that the Commission shall ensure the independence of the media, and protect media practitioners' rights and privileges. Therefore, ARTICLE 19 strongly recommends that the Government abandons the current focus of the Bill on control and punishment in favour of an approach that stresses the need to protect media practitioners' rights and to promote good practice through dialogue.

The heavy-handed regulation in the Bill becomes even more unjustifiable in light of the fact that the system fails to make the nearly universally recognised distinction between the print and broadcast media. There are fundamental differences between the written and the broadcast media. Traditionally, the limited availability of broadcast frequencies has served as a justification for statutory regulation of the broadcast media. Such laws are tailored to the nature of the broadcast media and address issues such as the role of public

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<sup>25</sup> Cf. *Tolstoy Miloslavsky v. the United Kingdom*, Judgment of 23 June 1995 (European Court of Human Rights), where the Court found that a disproportionate award of damages in a libel case constituted an illegitimate restriction on freedom of expression, and *Laptsevitch v. Belarus*, Decision of 20 March 2000, Communication no. 780/1997 (UN Human Rights Committee), where the Committee found that a registration requirement for a publication with a print-run as low as 200 was likely to 'chill' speech.

<sup>26</sup> This is the case, for example, with an appropriately applied directive to apologise, currently envisaged in Section 20(i).

service broadcasters, the role of private broadcasters, licensing regimes, advertising rules and the allocation of broadcast frequencies. In addition, because of the relatively powerful and intrusive nature of the medium, some regulation of content is accepted as legitimate, for example in relation to subliminal images, advertising, violence, sexual content, gender stereotyping and watershed broadcast times for children. Regulation of the written press cannot be legitimised by reference to these justifications and, as a result, is a lot less prescriptive in most countries. The Government should therefore consider excluding the written media from the scope of this Bill altogether. In any event, it is not appropriate to include both the print and broadcast media within the same regulatory regime.

**Recommendations:**

- The Government should refrain from adopting legislation on media regulation at least until the possibility of voluntary self-regulation has been fully explored.
- The Bill should aim to protect media practitioners' rights and promote standards rather than to control the media. In this regard, any regulatory body should not have excessive policing and judicial powers.
- The sanctions regime should be revised and all criminal sanctions and offences should be removed.
- The print and broadcast media should not be subject to the same regulatory regime.

**III.2 The registration scheme**

Section 10 of the National Media Commission Bill provides: "No media organisation or media practitioner shall engage in the dissemination of information by mass communications unless registered in accordance with this section." Under Section 10(5), non-registration is made a criminal offence punishable by a fine of not less than 5000 dalasis (US\$350). Default in payment will result in a three-month suspension of the licence of a media organisation or a nine-month licence suspension for an individual practitioner.

ARTICLE 19 is deeply concerned by the registration requirement itself as well as by the sanctions for non-registration. Any requirement for individual practitioners to register is incompatible with the right to freedom of expression. In an Advisory Opinion concerning a compulsory licensing scheme for journalists in Costa Rica the Inter-American Court of Human Rights clearly stated the principle:

[T]he compulsory licensing of journalists does not comply with the (right to freedom of expression) because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly

conceivable without the necessity of restricting that practice only to a limited group of the community.<sup>27</sup>

The illegitimacy of individual registration is highlighted by the paucity of arguments in favour of it. If an individual feels personally insulted or attacked by a TV or radio broadcast or a newspaper article, they can institute civil defamation proceedings against the concerned organisation, the editor or the writer. Registration is therefore unnecessary. Furthermore, registration is excessively onerous for newspapers who use a large number of journalists, and it exerts a chilling effect on occasional publishers. This has been recognised in practice by other countries in the region. Individual practitioners should therefore not be required to register with the Commission.

Similarly, ARTICLE 19 recommends that the registration scheme for media organisations should be dropped. Although international law does not at present rule out purely technical registration schemes, they serve no purpose and can exert a chilling effect on freedom of expression. If the Government does decide to require media organisations to register, this must be a purely administrative matter, akin to company registration. The information required should be lodged with an administrative body and registration should be automatic upon the submission of the relevant documents. Thus, a technical registration scheme for mass media organisations is compatible with the guarantee of freedom of expression only if it meets the following conditions:

- the authorities should have no discretion to refuse registration once the requisite information has been provided;
- registration should not impose substantive burdens and conditions upon the media; and
- the registration system should be administered by bodies which are independent of government.<sup>28</sup>

The problem of the registration requirement is compounded by the potentially very broad definition of a 'media practitioner' as:

[A] person engaged in the writing, editing or transmitting of news and information to the public and includes journalists and the proprietor, publisher, editor and manager of a newspaper or broadcast station.<sup>29</sup>

This definition could cover an extraordinarily wide range of people, including not only the written press and broadcast media but also Internet-based publishers, Internet service providers (ISPs), and occasional publishers, including human rights defenders.

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<sup>27</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, (Series A) No. 5 (1985), paragraph 79.

<sup>28</sup> See *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communication nos. 105/93, 130/94, 128/94 and 152/96 (African Commission on Human and Peoples' Rights).

<sup>29</sup> Section 2.

It is clear from the jurisprudence of the UN Human Rights Committee that a requirement for occasional or small-scale publishers to register is incompatible with the right to freedom of expression. The Committee held that imposing sanctions on someone for distributing a document with a print run of just 200 copies was disproportionately onerous, exerted a chilling effect on freedom of expression and could not be justified in a democratic society.<sup>30</sup> For these reasons, any registration scheme should apply, if at all, only to periodic, publicly available, mass media. To include the Internet within the remit of the Bill and to require Internet-based media practitioners to register would certainly be incompatible with the right to freedom of expression.<sup>31</sup>

Finally, any registration scheme should not be enforced in the heavy-handed manner envisaged by the Bill. To make non-registration punishable by a fine of at least 5000 dalasis (approximately US\$350), in default of which the licence is to be suspended, is clearly disproportionate.<sup>32</sup> A light, administrative sanction would be more appropriate.

### **Recommendations:**

- Individual media practitioners should not be required to register and the law should not seek to define this sector.
- The Government should consider abolishing the registration system that the Bill would establish.
- If registration is to be required, it should be brought into line with the conditions noted above.
- Any sanctions for non-registration should be administrative in nature.

### **III.3 Composition and functions of the Commission**

#### *Membership*

Under the Bill, the Chair of the Commission is to be appointed by the President, and the Permanent Secretary of the Department of Information will be a member. The other members of the Commission will be nominated by various different interest groups.<sup>33</sup>

It is well-established that bodies with regulatory control over the media must be independent of government, particularly where they have a lot of power, the case with the proposed Commission, as noted above. Constitutional courts in several countries have affirmed this point. For example, the

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<sup>30</sup> *Laptsevitch v. Belarus, op cit.*, paras. 8.1-8.5.

<sup>31</sup> *Ibid.* See also *ACLU v. Reno*, 521 US 844 (1997), in which the United States Supreme Court declared Government attempts to control the Internet incompatible with the Constitutional guarantee of free speech.

<sup>32</sup> In *Laptsevitch v. Belarus, op cit.*, the complainant was fined a similar amount. The UN Human Rights Committee in that case found a violation of the right to freedom of expression.

<sup>33</sup> Section 4.

Supreme Court of Sri Lanka, faced with a Bill providing for a Broadcasting Authority, some of whose members would be Government appointees, stated:

Since the proposed authority, for the reasons explained, lacks independence and is susceptible to interference by the minister, both the right of speech and freedom of thought are placed in jeopardy...We are of the opinion [that the bill's provisions] are inconsistent with ... the Constitution.<sup>34</sup>

The Committee of Ministers of the Council of Europe last year issued a detailed Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.<sup>35</sup> This provides that States should "guarantee the regulatory authorities for the broadcasting sector genuine independence". Furthermore, "the procedures for appointment of their members and the means of their funding should be clearly defined in law."<sup>36</sup> Stipulating that its membership should be free from any political influence and that rules for dismissal should be clearly laid down by law, it recommends that "dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal."<sup>37</sup>

Similarly, The Charter on African Broadcasting 2001, recently adopted by a UNESCO/MISA-sponsored conference celebrating the 10<sup>th</sup> anniversary of the Declaration of Windhoek on Promoting an Independent and Pluralistic African Press, which was unanimously endorsed by the General Conference of UNESCO,<sup>38</sup> states, under the heading General Regulatory Issues:

2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party.

It can be argued that even a mere suspicion of improper interference suffices to cast doubt on the constitutionality of the authority. As Lord Denning MR explained:

[I]n considering whether there was a real likelihood of bias, the court does not look at the mind of justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people.<sup>39</sup>

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<sup>34</sup> *Athukorale and others v. Attorney-General*, 5 May 19978, 2 BHRC 609.

<sup>35</sup> Recommendation (2000) 23, adopted 20 December 2000.

<sup>36</sup> *Ibid.*, Guideline 2

<sup>37</sup> *Ibid.*, Guideline 7.

<sup>38</sup> Resolution 4.3, adopted by the General Conference at its 26<sup>th</sup> Session, 1991.

<sup>39</sup> *Metropolitan Properties co. (F.G.C.) Ltd v. Lannon*, [1969] 1 QB 577, at 599.

In the hallowed phrase, “justice must not only be done, it must also be seen to be done”.<sup>40</sup>

The fact that the Chair is appointed by the President and the presence of a Permanent Secretary clearly undermine independence of the Commission and cannot be justified. ARTICLE 19 recommends that any Commission be appointed in a manner consistent with the Charter on African Broadcasting. One possibility is for a two-tier system whereby members are nominated by Parliament and appointed by the President.

### *Ensuring impartiality and independence*

The Bill provides little detail on how the Government intends to ensure the Commission’s independence and impartiality. In fact, the Bill omits explicitly to affirm the Commission’s independence.

The Council of Europe Recommendation on the Broadcasting Sector stipulates amongst other things that “[t]he rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.”<sup>41</sup> In particular, this means that the regulatory authorities should be protected from all forms of political and economic interference, including interference by public authorities. Initially, this is achieved by proper arrangements for appointments and membership of the Commission, as outlined above. Once in place, the legislative framework should then shield the regulatory body from outside interference. Protection from economic interference implies financial independence: “Arrangements for the funding of regulatory authorities - another key element in their independence - should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities’ activities, so as to allow them to carry out their functions fully and independently.”<sup>42</sup>

There should be regulations to avoid conflicts of interests. Rules of incompatibility should be drawn up to avoid members of the Commission being under the influence of political or economic powers.

Finally, it is important that while the Commission should be independent, it should also be fully accountable. To balance these two needs, the Commission should be accountable to the National Assembly, a multi-party body. This includes a requirement to lay before the Assembly an annual report, as is required under Section 25 of the Bill.<sup>43</sup> It is important that this should include full case reports as well as any recommendations the Commission has made and a report of its other activities.

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<sup>40</sup> For the application of this maxim see for example *Locabail (UK) Ltd v. Bayfield Properties Ltd and another*, [2000] 1 All ER 65; *A.M.&S. Europe Ltd v. the Commission*, [1983] 1 All ER 705; and *Maynard v. Osmond*, [1977] 1 All ER 64.

<sup>41</sup> *Ibid.*, Guideline 1.

<sup>42</sup> *Ibid.*, Guideline 9.

<sup>43</sup> It should be made available to the public free of charge or for a nominal fee, and be published on the Internet.

## **Recommendations:**

- Members of the Commission should be appointed in an open and transparent manner which involves the participation of civil society and is not controlled by any particular political party. Dismissal should be protected against political interference.
- No Government appointees should sit on the Commission.
- The Bill should include conflict of interest rules for members of the Commission.
- The financial independence of the Commission and the availability of adequate funding should be guaranteed.
- The Commission should be accountable to Parliament, not to the Government.

### **III.4 The Code of Conduct**

Section 5(c) of the Bill states: “The Commission shall ... provide for a Code of Conduct for media practitioners and set standards with regards to the content and quality of materials for publication or broadcast by the media”. However, Section 27 provides: “The Secretary of State may ... make regulations providing for a code of conduct for media practitioners.” The implication is that while the Commission will draw up the Code, it will do so under instruction of the Secretary of State. This means, for example, that the Secretary of State will have the power to stipulate by regulation the issues that are to be included in the Code. In its current state, the Bill does not provide for broad participation in the drawing up of the Code of Conduct.

The Code of Conduct will be a crucial document, as it will set the standards by which the media will have to abide. Therefore, it should be developed without Government interference of any sort and the Bill should provide for broad input and consultation from interested parties, including independent as well as State media. Rather than allow the Secretary of State to determine these conditions, or the specific issues the Code should deal with, these matters should be included in the Bill.<sup>44</sup>

As noted above, ARTICLE 19 strongly recommends self-regulation for the print media. However, should the Government nevertheless decide that the written press should also be regulated by a statutory Code of Conduct, we recommend that two separate Codes should be drawn up, one for the print and one for the broadcast media, each tailored to the specific requirements of the sector concerned. The print and broadcast media are very different in nature, and it would be inappropriate as well as ineffective to attempt to draw up a single Code to cover both.

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<sup>44</sup> See, for example, Section 152 of the UK Broadcasting Act 1990 (c. 42), which deals with the Code relating to broadcasting standards drawn up by the Broadcasting Standards Council.

## **Recommendations:**

- The Bill should provide that the Commission will develop a Code of Conduct in close consultation with broadcasters and other interested parties.
- The Secretary of State should not be involved in the development of the Code; rather, matters of process and the broad issues with which the Code is to deal should be set out in the Bill.
- If the print media are to be included within the remit of the Bill, they should not be covered by the same Code as the broadcast media.

### **III.5 The consideration of complaints**

Under Section 12 of the Bill, the Commission may inquire and investigate into complaints lodged with it against media practitioners. Section 11 provides that a person who is aggrieved by anything that has been published in respect of them may lodge a complaint with the Commission. A media practitioner against whom a complaint has been lodged may make representations to the Commission, either orally or in writing. Section 13 provides that the Commission may determine its own procedures for each inquiry, and that material that would be inadmissible in the courts may be used in evidence before it. Section 14 states that the Commission may summon witnesses, who, if they testify before it, will be granted immunity from civil suit. Section 16 provides that the Commission may decline to investigate or discontinue an inquiry if the complaint appears trivial, frivolous or is not brought in good faith, or when the inquiry would be “unnecessary, improper or worthless”. Under Section 17, the Commission is required to notify the complainant of the outcome of an inquiry. Section 18 protects the Commission or a member of its staff from civil proceedings in regard to anything done in the exercise of their official functions; furthermore, a Commissioner or a member of the Commission’s staff may not be required to give evidence in any judicial proceedings in respect of anything that has come to their knowledge in respect of their official functions. Finally, Section 22 states that there shall be no appeal from a decision of the Commission.

These provisions raise a number of issues regarding the scope of complaints and the fairness of proceedings before the Commission. We have already noted that the overall approach of the Bill, by establishing a quasi-judicial body with far-ranging powers and rules of procedure that resemble those of a criminal trial, is illegitimate. This should be abandoned in favour of a focus on promoting good practice and standard setting through dialogue and protecting media practitioners’ rights. Although we are therefore of the view that the whole approach of the Bill as currently drafted is illegitimate, certain features nevertheless require particular comment. In particular, we comment below on three key issues: the scope of complaints, the investigative powers of the Commission and the lack of protection for confidential sources, and the lack of transparency of the complaints process.

### *Scope of Complaints*

Pursuant to Section 11, individuals may lodge a complaint whenever they feel 'aggrieved by anything', whether or not this falls within the remit of the Code of Conduct. Read in conjunction with Section 20(1)(c), which states that the Commission may find in favour of a complainant if it considers that the media practitioner or organisation was 'blameworthy', this confers on the Commission an extremely broad and undefined jurisdiction. The purpose of the Code of Conduct is to set out clear and accepted rules for what is and is not appropriate media behaviour. To allow complaints which are not based on the Code fundamentally undermines its role and puts the media in a position where they cannot know in advance what may attract a sanction. This breaches the requirement that restrictions on freedom of expression be provided by law and is sure to exert a chilling effect on freedom of expression. The Commission's jurisdiction should be limited to considering complaints under the Code of Conduct.

The Bill sets a period of twelve months from publication during which an 'aggrieved person' may file a complaint.<sup>45</sup> ARTICLE 19 considers this to be excessive, since media bodies, particularly the broadcast media, cannot be expected to keep archives for this long. International practice shows that a period of thirty days is the norm.

### *Investigative powers and protection of sources*

Pursuant to Section 19 of the Bill, the Commission will have the power to "require to have access to any book, voucher, stamp, newspaper, tape, equipment, data storage devices, store or other movable goods in the possession or under the control of any person in relation to an inquiry". This implies that the Commission and its agents will have powers of access to any physical material without having to apply for a judicial warrant. Such a power would be in direct violation of Article 17 ICCPR, which protects privacy, and should be deleted.

Likewise, under Section 19(e) of the draft Bill the Commission may request "particulars and information from a media practitioner in relation to an inquiry". As there are no conditions on the use of this power, it could be used to require journalists to reveal their sources; in contravention of the right to freedom of expression. In this regard, the European Court of Human Rights has held:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be

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<sup>45</sup> Section 11(2).

compatible with [the right to freedom of expression] unless it is justified by an overriding requirement in the public interest.<sup>46</sup>

The Bill should ensure that confidential sources are excluded from the ambit of any mandatory disclosure scheme.

### *Transparency*

Section 17 of the Bill states that the Commission should inform the complainant of its findings. However, there is no requirement that the Commission should publish its findings to a wider audience. To ensure accountability, it is important that this should be the case. Wider publicity would also contribute to the Commission's standard-setting role, by increasing awareness of the Code and its standards. For these reasons, the Commission should make available its findings to a wider audience, for example by publishing a regular newsletter or by establishing an Internet site. As recommended above, full case reports should also appear in the Commission's Annual Report.

### **Recommendations:**

- The approach of the Bill towards enforcement should be fundamentally changed from a quasi-judicial procedure with heavy sanctions to promoting professional standards through dialogue.
- The Commission's jurisdiction should be strictly limited to considering complaints under the Code of Conduct.
- The time-limit for lodging a complaint should be thirty days instead of twelve months.
- The Commission should not have the power to access documents without a warrant and, in any case, the Bill should ensure protection for confidential sources of information.
- The Commission's findings should be widely published, including on the Internet.

### **III.6 Additional regulations**

Section 27 of the Bill provides that "[t]he Secretary of State may, on the recommendation of the Commission, make regulations for the better carrying out of the provisions of this Act."

This power needs to be carefully circumscribed to prevent possible abuse. In particular, the law should set out clearly the precise issues on which the Secretary of State may issue regulations. Moreover, to provide democratic accountability any regulations issued by the Secretary of State should be laid before the National Assembly before entry into force.

### **Recommendations:**

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<sup>46</sup> See *Goodwin v. the United Kingdom*, Judgment of 27 March 1997, para. 39.

- The Bill should clearly set out the areas where the Secretary of State will have the power to issue further regulations.
- Any regulations drafted by the Secretary of State should have to be laid before the National Assembly before becoming effective.