



MEMORANDUM

on

Draft Iraqi Media Laws

by

ARTICLE 19
Global Campaign for Free Expression

London
November 2004

I. Introduction

ARTICLE 19 has been asked to comment on a set of three regulatory documents for the media drafted by the Iraqi National Communication and Media Commission (NCCM): a Code for Media during Elections; an Interim Broadcasting Programme Code of Practice; and an Interim Media Law. Of these, the Interim Broadcasting Code of Practice is already in force, having been adopted by the NCCM on 27 July 2004. As an interim code, it is intended to be replaced shortly by a code based on broad consultation. The original deadline set for adoption of a new Code was 30 October 2004, although we have been informed the deadline has been extended until the end of November. The Elections Code is in draft, as is the Interim Media Law. The latter is to be proposed to the Council of Ministers as a draft Law; the Elections Code can be adopted by the NCCM acting under its mandate.

ARTICLE 19 views both the existing Broadcasting Code and the two drafts as a significant step forward in terms of media regulation. The present regulatory framework consists of a patchwork of Hussein-era laws, CPA regulations and the NCCM regulations.¹ Under the draft Interim Media Law, significant portions of the Hussein-era

¹ ARTICLE 19 published a Memorandum analysing the Hussein-era laws and some CPA regulations in February 2004. The Memorandum is available at: <http://www.article19.org/docimages/1721.doc>. We

laws, as well as some CPA orders, would be repealed and replaced by more appropriate regulations.

However, while we share the NCMC's analysis that the existing provisions in Iraqi law on hate speech and defamation are incompatible with the international guarantee of freedom of expression, we are not sure that the solution proposed in the draft Interim Media Law, whereby the old rules are abrogated and replaced by new rules which are applicable only to the media, is appropriate. Media-specific rules are generally deemed illegitimate under international law and this approach leaves the authorities without any legal mechanism through which to tackle defamation and incitement committed by non-media actors.

We have a number of concerns relating to the proposals to allocate enforcement powers over essentially criminal and civil law provisions relating to defamation and incitement to the NCMC. Its independence is not adequately guaranteed; and the NCMC is not equipped or trained to fulfil judicial functions, having neither appropriately trained staff nor the necessary detailed rules of evidence and procedure. It is even questionable whether it would be constitutional for the NCMC to apply these provisions.

The temporary regime established by the interim media law would expire 30 days after the elections for a new government, unless affirmed by the new government. In practical legislative terms, this means that the new proposals, if accepted by the Council of Ministers, would present the new government with a virtual *fait accompli* as it is unlikely that the drafting of new defamation and incitement provisions is something that can be undertaken in the first month of a new government. The alternative, that the new government would allow the Interim Media Law to lapse, would be even less attractive in that it would create a legal vacuum. Even worse, the old laws could be resuscitated.

We also have a number of detailed concerns regarding the specific content and other rules in the interim media law and the broadcasting and election codes mentioned above. One overarching concern here relates to the cultural shift that will be required for their proper implementation. Iraq has been on the road to democracy for a few months only and there is no tradition of progressive media regulation in the country. Experience in other transitional democracies has shown that broadcasters are often under the mistaken impression that 'freedom' means that they may do practically anything they like, while regulators frequently succumb to the temptation to employ the overly heavy-handed regulatory methods that were used under the 'old' regime.

We have already seen an important warning sign of the latter with the indefinite closure in Iraq of Al Jazeera, in August of this year.² Against this background, we are concerned that some of the terminology employed in the new regulations, while easily understood in established democracies, will not be clear to Iraq's media or its media regulators, and that it may even be open to abuse. Both the media and the regulators will need to learn

recommended the abolition of the vast majority of these laws and regulations as they are incompatible with the right to freedom of expression.

² "Iraq extends al-Jazeera ban and raids offices", the *Guardian*, 6 September 2004.

how to work with terms such as ‘accuracy and fairness’ and ‘the public interest’, which are frequently employed in the Codes. For these reasons, it is crucial that new laws and regulations be drafted in terms that are as clear and detailed as possible and that they be accompanied by explanatory memoranda that explain in laymen’s words the legal and regulatory terminology and provide examples of how they might be applied in practice. It is also important that an extensive training programme is put in motion to educate both the media and the regulators on the functioning of the media in a democratic society. In our analysis in Section III, we identify those areas where the terminology that is used may be in need of clarification.

Apart from concerns relating specifically to the three documents under review, we are also concerned at recent media reports regarding the establishment of a Higher Media Council, in late July 2004, and the extent to which the mandate of this new body may overlap with that of the NCMC. We have not seen any constitutive documents relating to this body but we are concerned at reports that it is headed by a senior member of Prime Minister Allawi’s Iraqi National Accord party and that it apparently operates with the Prime Minister’s blessing.³ Both of these would seriously impair its independence. As is well-established in international law, any bodies with regulatory powers over the media should be independent from political or economic interests. In any event, the co-existence of two bodies both of which have regulatory powers over the media is not conducive to the establishment of a sound regulatory framework for Iraq’s fledgling media. We therefore recommend that this situation be addressed as a matter of urgency.

Section III of this Memorandum addresses our main concerns with the draft Interim Media Law, the Interim Broadcasting Programme Code of Practice and the draft Code for Media during Elections in detail, providing recommendations and suggestions for improvement throughout. The Memorandum provides an analysis of the extent to which the three documents are compatible with international standards on the right to freedom of expression. These are described in Section II of this Memorandum, which discusses mainly the standards developed under the *International Covenant on Civil and Political Rights*, a legally binding treaty ratified by Iraq on 25 January 1971, by bodies such as the UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression. This section also draws on the jurisprudence of other courts and bodies, such as the European Court of Human Rights. While these are clearly not binding on Iraq, they provide authoritative evidence of the scope and nature of international and, indeed, national guarantees of freedom of expression.

II. International and Constitutional Obligations

II.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR) guarantees the right to freedom of expression in the following terms:

³ “Reimposing controls on the Iraqi press”, *International Herald Tribune*, 9 October 2004.

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.⁴

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵

The *International Covenant on Civil and Political Rights* (ICCPR),⁶ a treaty ratified by over 150 States, including Iraq,⁷ imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

1. Everyone shall have the right to freedom of opinion.
2. 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 also protected under Article 13 of the Law of Administration for the State of Iraq for the Transitional Period, which currently serves as Iraq's constitution.⁸

Freedom of expression is also protected in all regional human rights instruments, at Article 10 of the *European Convention on Human Rights*,⁹ Article 13 of the *American Convention on Human Rights*¹⁰ and Article 9 of the *African Charter on Human and Peoples' Rights*.¹¹ The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although not directly binding on Iraq, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.¹²

⁴ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁵ See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see McDougal, M.S., Lasswell, H.D. and Chen, L.C., *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

⁶ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁷ Iraq ratified the ICCPR on 25 January 1971.

⁸ Adopted 8 March 2004.

⁹ Adopted 4 November 1950, in force 3 September 1953.

¹⁰ Adopted 22 November 1969, in force 18 July 1978.

¹¹ Adopted 26 June 1981, in force 21 October 1986.

¹² The Human Rights Committee has referred to the jurisprudence of other courts, including the European Court of Justice and the European Court of Human Rights, to inform its own decisions and holdings. See, for example, *Vos v. the Netherlands*, 29 July 1999, Communication No. 786/1997 and Record of the 1558th meeting, 58th session: Germany, 15 November 1996, UN Doc. CCPR/C/SR.1558.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”¹³ As the UN Human Rights Committee has said:

The right to freedom of expression is of paramount importance in any democratic society.¹⁴

The European Court of Human Rights has also elaborated on the importance of freedom of expression:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... 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 the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.¹⁵

The guarantee of freedom of expression applies with particular force to the media. The European Court of Human Rights has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”¹⁶ It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.¹⁷

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.¹⁸

The European Court of Human Rights has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart

¹³ 14 December 1946.

¹⁴ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

¹⁵ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹⁶ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹⁷ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

¹⁸ UN Human Rights Committee General Comment 25, issued 12 July 1996.

information and ideas 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”.¹⁹

The European Court has shown some robustness in applying these broad principles in practice. For example, in one case, it found a violation of the right to freedom of expression where a Portuguese court had fined a newspaper editor for referring to a political candidate as “grotesque”, “buffoonish” and “coarse”.²⁰ The Court stressed that in the context of political debate, “political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.”²¹ In another case, the Court found a violation where an Austrian journalist had been convicted for referring to a politician as a ‘Trottel’, an insulting term that can be translated loosely as ‘idiot’.²² Considering that the journalist had responded to a particularly provocative and controversial speech, and had provided some objective justification for calling the politician an ‘idiot’, the Court found that this did not overstep the bounds of what was permissible: “It is true that calling a politician a Trottel in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by [the politician].”²³

II.2 Restrictions on 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 ICCPR lays down the conditions which any restriction on freedom of expression must meet:

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.

A similar formulation can be found in the European, American and African regional human rights treaties. These have been interpreted as requiring restrictions to meet a strict three-part test.²⁴ International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

¹⁹ See *Castells v. Spain*, note 17, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

²⁰ *Lopes Gomes da Silva v. Portugal*, 28 September 2000, Application No. 37698/97.

²¹ *Ibid.*, para. 34.

²² *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92.

²³ *Ibid.*, para. 34.

²⁴ See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.²⁵

First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁶ Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.²⁷

A specific set of minimum principles related to restrictions on national security grounds is set out in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.²⁸ They recognise that the right to seek, receive and impart information may, at times, be restricted on specific grounds, including the protection of national security. However, national security cannot be a catchall for limiting access to information.

Both the UN Human Rights Committee and the European Court of Human Rights have on several occasions had to deal with cases in which States have sought to justify restrictions on freedom of expression or other human rights by reference to national security considerations.

The UN Human Rights Committee has made it clear that the onus is on the State seeking to justify a restriction based on grounds of national security by reference to a specific threat. In the case of *Jong-Kyu v. Republic of Korea*,²⁹ for example, the government had claimed that a national strike in any country would pose a national security and public order. The Committee held that this failed to pass the necessity part of the test.

In a similar vein, the European Court has warned that laws that restrict freedom of expression on national security grounds must lay down clear and precise definitions, so as to safeguard against abuse.³⁰ The Court has issued repeated warnings against excessive use of national security laws, in many cases finding violations of fundamental human rights. In a case involving Romania, involving data that had been gathered on the

²⁵ See, for example, *Thorgeirson v. Iceland*, note 16, para. 63.

²⁶ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

²⁷ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

²⁸ Adopted in October 1995 by a group of experts in international law and human rights convened by ARTICLE 19 and the Centre for Applied Legal Studies of the University of the Witwatersrand. They have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression.

²⁹ July 1995, Communication No. 518/1992.

³⁰ See, for example, *Klass v. FRG*, 6 September 1978, Application No. 5029/71.

applicant by the security services, the Court noted that it had “doubts as to the relevance to national security of the information”.³¹ It went on to find a violation of the applicant’s rights.

The Court has also warned against the use of national security laws even in situations of armed internal conflict. While stressing that it would not condone the use of the media as a mouthpiece for advocates of violence, it has said that States “cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media.”³²

III. Detailed Analysis

III.1 Overview

The three documents that ARTICLE 19 has been asked to comment on will form an important part of the media regulatory framework in Iraq and could play a crucial role in the establishment of a vibrant and pluralistic media. The Interim Broadcasting Programme Code of Practice (Broadcasting Code) lays down a number of general rules and guidelines on content standards such as privacy, fairness and impartiality, and violence in programme content. Standards such as these are important in guiding broadcasters as to the kind of content that is permissible. The Code for Media during Elections (Elections Code) regulates the specific role of the media during elections, dealing with issues such as political advertising, fair reporting and the publication of opinion polls, which are all crucial matters during elections. It would give the NCMC the power to intervene, for example by granting a right of reply to a political candidate who was defamed. The Interim Media Law (draft Law), finally, deals with the important issues of defamation and incitement of violence through the media.

In the following sections of the Memorandum, we describe each of the three instruments in detail and analyse their provisions against international standards on freedom of expression, as outlined above.

III.2 The Draft Interim Media Law

The draft Interim Media Law deals with two substantive issues that are very relevant to the media in Iraq today: defamation and incitement/encouraging terrorism. According to the explanatory memorandum that accompanies the draft Law, “some media in Iraq are disseminating inflammatory and inaccurate information”. The Memorandum goes on to note that under the law as it stands, the only legal response to such media practice is through CPA Regulation No. 14 or the Hussein-era Penal Code, both of which pose unnecessarily restrictive standards and lack due process guarantees. The draft Media Law therefore proposes, as an alternative, that the various Penal Code provisions

³¹ *Rotaru v. Romania*, 4 May 2000, Application No. 28341/95, para. 53.

³² *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para. 54.

relating to these matters should be repealed, along with CPA Order No. 14, and that the NCMC should hear complaints regarding its provisions on defamation and incitement to violence.

While we share wholeheartedly the analysis that the current criminal law is inappropriate in dealing with defamation and incitement to violence,³³ we have a number of concerns with the proposed new regime. These concerns are outlined below.

III.2.1 Defamation and Incitement as ‘Media Offences’

Under Articles 5 and 6 of the draft Media Law, CPA Order No. 14, dealing with incitement, and a range of criminal provisions dealing with defamation are to be permanently repealed. In order to prevent the creation of a legal vacuum, two new provisions on incitement and defamation are being proposed. The preamble of the draft Media Law provides the following justification for the specific application of the defamation and incitement regimes to the media:

The Council of Ministers recognises that, ordinarily, incitement to violence and defamation are regulated through legislation of general application, rather than law applying specifically to media. It also notes, however, that some media in Iraq consistently disseminate inflammatory and inaccurate information and that the only modes for enforcement against such dissemination are the severe restrictions.... currently found in Iraqi law, and CPA Order 14 in particular.

Although we fully agree that the existing provisions are highly problematical, we have serious concerns with the specific application of the new regime, whatever shape or form it should take, to the media only. There are two problematical aspects to this. First, recognised to some extent in the above quotation, to establish a special regime applicable only to the media is both discriminatory and in breach of the general principle that the media should not be subject to special rules relating to content, outside of appropriate broadcasting codes, where applicable. Even if the intentions behind the scheme are worthy, this is particularly problematical in Iraq, which after decades of totalitarian rule is just beginning to introduce the principles of democracy. Sending a signal that it is acceptable to create special criminal regimes for the media is very unfortunate and may be used to justify future, illegitimate, media-specific regulation.

Second, while it may well be true that there are elements within the media that engage in the publication of hate speech and defamation, these issues are a problem outside the media as well. Repealing the existing law and rendering the new regime applicable only to the media would create a legal vacuum whereby defamation and incitement would be actionable only if they are committed by the media. This is obviously problematical in that it renders the authorities powerless to take any legal action against non-media actors who incite hatred or violence.

³³ In our February 2004 Memorandum (note 1), we strongly recommended that the current regime be repealed and replaced with more appropriate legal provisions.

We very much endorse the idea of replacing the existing provisions with new rules relating to defamation and incitement but it is not clear, however, why the Penal Code could not be amended to provide for better incitement provisions, or why more appropriate civil law provisions could not be introduced to deal with defamation. Indeed, we note that, according to a report submitted by Iraq to the UN Human Rights Committee in 1996, compensation for defamation may be claimed under articles 204 and 205 of the Civil Code.³⁴ Presumably, these provisions remain in force and may still be enforced through the civil courts, in parallel to the defamation regime created by the draft Media Law.

We recommend that consideration be given to introducing the rules relating to defamation and incitement as a set of repeals and amendments to the civil and penal codes, respectively. Such measures could, if that were deemed necessary, be adopted on the same basis as is proposed for the media law, namely on an interim basis subject to future Iraqi government ratification. We note that such measures are justified in the circumstances as necessary to ensure respect for human rights, while at the same time preventing a legal vacuum.

At the same time, subject to our concerns regarding the enforcement role of the NCMC,³⁵ these rules could be incorporated, in identical form, into the Interim Media Law. This would effectively avoid the problem of establishing media-specific provisions and yet allow for enforcement through the NCMC. In this case, the Interim Media Law should make it quite clear that it is not establishing special rules for the media, but simply establishing a media-specific system for applying the rules.³⁶

Recommendation:

- The media should not be subject to special rules on defamation and incitement/advocacy of terrorism. Consideration should be given instead to amending the existing rules in the criminal and civil codes.

III.2.2 NCMC Enforcement

Pursuant to Article 4 of the draft Media Law, complaints of breach of the new provisions relating to defamation and incitement/advocacy of terrorism are to be dealt with by the NCMC. The preamble of the draft Media Law provides the following justification for this:

The Council of Ministers... notes, however, that some media in Iraq consistently disseminate inflammatory and inaccurate information and that the only modes for enforcement against such dissemination are the severe restrictions and insufficient due process currently found in Iraqi law, and CPA Order 14 in particular. As such,

³⁴ Fourth periodic report of States parties due in 1993: Iraq. 28 November 1996, UN Doc. No. CCPR/C/103/Add.2.

³⁵ See Section III.2.2, below.

³⁶ We note that this is also problematic but that it may be justified by the particular circumstances applying in Iraq at present.

the Council of Ministers has passed this Interim Media Law to be enforced by the NCMC against the media that violate it ...³⁷

While we accept that the current criminal law lacks appropriate due process guarantees,³⁸ this does not necessarily justify elevating the NCMC effectively to a court. As with the substance of these offences, direct amendments to the Penal Code could presumably redress these problems.

A perhaps more persuasive case could be made that the courts have little familiarity with the principles of human rights in general, and freedom of expression in particular, and that as yet, they are unable to act in fair and independent ways. As such, to allow them to apply these freedom of expression sensitive rules would be problematic. We are not in a position to assess the extent to which this is correct or whether sufficient attention has been directed at options such as reforming/strengthening the existing justice system.

We also have concerns not only about the idea of media-specific substantive rules, outlined above, but also about media-specific enforcement of rules of general application, as proposed here. While we recognise that administrative systems governing broadcast licensing and standards are common and, if they meet certain conditions, are consistent with the right to freedom of expression, this is quite different from media-specific systems for enforcing rules which are otherwise generally applicable. While this may be a lesser evil than imposing media-specific substantive rules, it nevertheless suggests that specific arrangements for the media are acceptable whereas, in more normal circumstances, they would not be. At a minimum, it is important that the Interim Media Law stress the interim and exceptional nature of this arrangement and provide more persuasive justification for it (that is, that the courts lack the independence and familiarity with freedom of expression to ensure appropriate application by them of these rules).

Regardless of the above, we have a number of specific concerns with this envisaged new role for the NCMC, including:

1. There are problems with the NCMC acting as a court since this is barred by the Transitional Administrative Law and the NCMC has not been established as an ‘independent and impartial tribunal.
2. The NCMC rules of procedure do not offer sufficient due process guarantees.

III.2.2.1 NCMC is not appropriately constituted to act as a ‘court’

Even if it is judged that the current justice system cannot be improved and cannot cope with defamation and incitement claims, and that it is therefore necessary for the NCMC to take on the judicial role under consideration here, a number of issues need to be considered.

³⁷ Draft Interim Media Law, Preamble.

³⁸ Including CPA Order No. 14.

First, there is the constitutional position. The draft Media Law envisages that the NCMC would enforce the prohibition on incitement and advocating terrorism, a provision which by its nature and by nature of the sanctions that may be imposed for its violation must be considered as criminal.³⁹

Under Article 43 of the Law of Administration for the State of Iraq for the Transitional Period (TAL),⁴⁰ which currently has the status of Iraq's constitution, "[t]he judiciary shall enjoy exclusive competence to determine the innocence or guilt of the accused pursuant to law..." This would appear to rule out a commission such as the NCMC taking jurisdiction over the criminal offence of incitement.

Second, even if the constitutional position is resolved, it is doubtful whether the NCMC can be regarded under the *International Covenant on Civil and Political Rights* as a properly constituted tribunal for the purpose of hearing these cases. Article 14 of the ICCPR requires:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The consideration by the NCMC of criminal incitement charges or complaints of defamation both clearly fall within the category of decisions subject to Article 14 of the ICCPR. The Human Rights Committee has elaborated the term 'independent and impartial tribunal' as implying safeguards in relation to the manner in which judges are appointed, the qualifications for appointment and the duration of their terms of office.⁴¹ The Committee strongly endorses judicial tenure as a prerequisite for a sufficiently independent judiciary. In its Concluding Observations, the Committee has expressed concern that a six- or even ten-year term of office is not sufficient to guarantee independence.⁴² It has also considered that a person's legal qualifications should be paramount in the consideration of that person for appointment as a judge.⁴³

In contrast to these requirements, the NCMC Commissioners are appointed for a term of only four years. While this may be perfectly legitimate for a regulatory body, particularly one which is interim in nature, it highlights the inappropriateness of the NCMC acting as a judicial body. Furthermore, Commissioners may have experience in a

³⁹ See *Engel v. the Netherlands*, 8 June 1976, Application Nos. 5100/71, 5101/71 and 5102/71 (European Court of Human Rights). See also *Morael v. France*, 4 November 1988, Communication No. 207/1986 (Human Rights Committee). It might be argued that the NCMC is simply playing an administrative role here, given the nature of the sanctions, which apply to the media outlet and not the individual responsible. This is belied, however, by the clearly criminal nature of this offence, found in criminal laws everywhere. Note, also, that Section 2.1 itself refers to incitement as an "offense".

⁴⁰ Adopted 8 March 2004.

⁴¹ General Comment No. 13, para. 3.

⁴² A system in which judges may be removed following a relatively short term in office is commonly viewed as being more susceptible to executive interference. See the Human Rights Committee's Concluding Observations on Algeria, 29 July 1998, UN Doc. CCPR/C/79/Add.95 and Armenia, 4 November 1998, UN Doc. CCPR/C/79/Add.100.

⁴³ Concluding Observations on Sudan, 19 November 1997, UN Doc. CCPR/C/79/Add.85.

range of fields other than legal experience. As a result, it is not only possible but actually likely that many will not have any legal expertise. The involvement of the Prime Minister in the appointments process for NCMC members and the lack of clear selection criteria,⁴⁴ introduces a real danger of political interference. The Director General, who would have jurisdiction to hear “less serious cases”, is appointed for four years and is not required to have any legal experience.⁴⁵

The length of tenure of members of the NCMC Hearings Panel, which may be expected to hear serious incitement allegations, is unspecified, although its members are at least required to have a ‘background’ in the legal profession.⁴⁶ The Appeals Board⁴⁷ also lacks the necessary criteria to be considered an impartial and independent tribunal.

III.2.2.2 NCMC’s rules of procedure are inadequate

We consider that the NCMC Rules of Procedure are wholly unsuited to conduct the kind of proceedings envisaged under the draft Media Law. The NCMC was envisaged as a regulatory body with some supervisory powers and with a jurisdiction to provide swift redress for violations of codes of conduct. Its Rules of Procedure have been drawn up with this function in mind; they do not envisage the NCMC’s functioning as a judicial body.

As noted above, we consider that the determination of incitement charges is criminal in nature.⁴⁸ In addition to the general requirement that the tribunal shall be impartial and independent, Article 14 of the ICCPR states that everyone charged with a criminal offence shall have the right:

- to be presumed innocent until proved guilty according to law;
- to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- to be tried without undue delay;
- to be tried in his presence;
- to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

⁴⁴ Clear selection criteria are also a requirement for judicial appointments processes. See *ibid.*

⁴⁵ *Ibid.*

⁴⁶ CPA Order No. 65, Section 4.

⁴⁷ Established under Section 4 of CPA Order No. 65.

⁴⁸ In contrast, the determination of a defamation charge may be considered as civil in nature.

- to have the free assistance of an interpreter if he cannot understand or speak the language used in court; and
- not to be compelled to testify against himself or to confess guilt.

Furthermore, everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law.

The NCMC Rules of Procedure and CPA Order No. 65 do provide some process guarantees but these are not sufficient. Consider the following as just a few of the many shortcomings:

- there is no mention of interpreters;
- there is no provision allowing defendants to call witnesses or to examine witnesses brought against him or her; and
- there is no provision for the provision of legal assistance if this is deemed necessary.

The NCMC Rules of Procedure also fail to provide any real detail regarding the rules of evidence – for example, will evidence be admissible if it was obtained in violation of other human rights standards – or such matters as the applicable standard of proof. Even in the consideration of the civil charge of defamation, there are insufficient due process guarantees to satisfy international law requirements.⁴⁹ In short, while the NCMC is correct in criticising the lack of due process guarantees in CPA Order No. 14, its own procedures are also insufficient.

Recommendations:

- Steps should be taken, if the NCMC is to be used as a court for purposes of defamation and incitement/advocacy of terrorism, to provide better guarantees for its independence and legal competence. At the very minimum, cases should be heard only by the Hearings Panel and not by the Director General.
- If the NCMC is to act as a court for purposes of defamation and incitement/advocacy of terrorism, its Rules of Procedure should be amended to provide the necessary due process guarantees, in line with the comments above.

III.2.3 The Defamation and Incitement Provisions

Under Section 5, CPA Order No. 14 is rescinded in its entirety. Section 6 proposes the repeal of a number of criminal law provisions dealing with incitement to violence or hatred, and defamation. Two new provisions are suggested to fill the gap left by the repeal of these provisions: Section 2 proposes a new provision on incitement to violence; and Section 3 proposes a new provision to deal with defamation. We will discuss these in turn.

III.2.2.1 Incitement

⁴⁹ Found in Article 14(1) of the ICCPR.

Section 2 states:

- 2.1 It shall be an offence for a Media Outlet to publish, broadcast or otherwise disseminate any material that, by its content or tone:
- (a) Carries the clear and immediate risk of inciting imminent violence, ethnic or religious hatred, civil disorder or rioting among the people of Iraq or advocates terrorism, crime or criminal activities (particular care is required where a programme carries the views or transmits the messages of people or organisations who use or advocate terrorism or the use of violence or other criminal activity in Iraq); or
 - (b) Carries a clear and immediate risk of causing public harm, such harm being defined as death, injury, damage to property or other violence, or the diversion of police, medical services or other forces of public order from their normal duties.
- 2.2 Any material that is merely offensive or insulting, but does not meet the standard set forth above, shall not create any liability under this Section 2. The dissemination of material followed by an act of violence, an act of ethnic or religious hatred, an act of civil disorder or rioting among the people of Iraq or advocates terrorism, crime or criminal activities that was not intended or could not reasonably have been foreseen to have the immediate consequence of such an act shall not be the basis of liability under this Section.

In a set of draft Guidelines for Broadcasters,⁵⁰ the Commission elaborates on the meaning of the terms ‘incitement’ and ‘ethnic or religious hatred’, and on what factors the Commission will take into account when examining a complaint. The draft Guidelines emphasise that the broadcast should incite *imminent* violence, ethnic or religious hatred, civil disorder or rioting and must carry the clear and immediate risk of causing such incitement. They also point out that ‘incitement’ spurs on an almost impulsive reaction. It does not attempt to convey a rational idea. The classic example, the draft Guidelines state, is that of shouting the word “fire” in a crowded movie theatre: this is not a communication designed for reflective thought; it is meant to provoke an instant and automatic reaction.

In assessing whether a particular publication incites violence or hatred, the draft Guidelines specify that the Commission will look at a number of factors:

- what was said;
- how it was said (including the type of publication and the language and gestures used);
- the context in which it was said;
- what was intended or known by the speaker; and
- what could reasonably be expected to be the likely consequences of the speech.

⁵⁰ Draft Guidelines for Broadcasters on Incitement to Violence, Ethnic or Religious Hatred, Civil Disorder or Rioting, 18 August 2004.

Understood as elaborated in the draft Guidelines, this incitement provision would be a significant step forward from the current criminal law. We do consider, however, that there might be some possible problems.

First, it may be extremely difficult to prove that an expression or publication has led to an ‘imminent’ attitude of ethnic or religious hatred emerging among ‘the people of Iraq’. Section 2 does not require any specific conduct to follow, only the sudden emergence of a hateful attitude. We appreciate that this is based on Article 20(2) of the ICCPR but we are concerned that, lacking any concrete indicators of how the sudden emergence of racial or ethnic hatred ‘among the people of Iraq’ is to be measured, the provision may be hard to enforce and is also open to abuse.⁵¹

Second, we are also concerned that the concept of “the diversion of police, medical services or other forces of public order from their normal duties” is vague and open-ended. Indeed, we question whether ‘diversion’ in this sense is an appropriate basis for restricting freedom of expression. Formally, a public television monitor which an on-duty police officer stops to watch would be diverting him or her from duty.

Third, we have serious concerns with the prohibition on the publication of material that merely “advocates” terrorism or criminal activity. It can often be difficult to draw a clear line between those publications that report or describe criminal activity and those that “advocate” it (see below). In any case, we note that the standard for liability here is vastly lower than under the incitement provision, which requires a risk of imminent violence. We note that it is, in many contexts, perfectly legitimate to advocate criminal activity, as long as this does not incite it. An example might be to advocate smoking marijuana as a medicinal remedy, still illegal in most countries. We are aware of the heightened concerns regarding advocacy of terrorism in Iraq, given the active unrest there. At the same time, this would clearly be covered by the prohibition on incitement to imminent violence or civil disorder. We therefore recommend that the additional prohibition of simple advocacy be removed from the draft Law.

Fourth, the distinction hinted at in Section 2.1(a) between a broadcast that itself incites proscribed conduct and a broadcast that merely reports the views of others is extremely important. This is a crucial distinction, as has been pointed out by the European Court of Human Rights:

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role as public watchdog. The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁵²

⁵¹ We note that CPA Order No. 14 proscribed only expression that led to violence or certain other conduct, which is a measurable indicator.

⁵² *Jersild v. Denmark*, 25 September 1994, Application No. 15890/89, para. 35.

The European Court made this statement in a case where a broadcaster had been convicted by the Danish courts for broadcasting an interview with neo-nazis who advocated ideas of racial hatred. The Court found a violation of the broadcaster's right to freedom of expression. Although in another case, the Court has warned that the media must not become "a vehicle for the dissemination of hate speech and the promotion of violence"⁵³ this clearly does not rule out reporting on current affairs issues.

It is not clear what is meant by the phrase 'particular care is required' in Section 2. The Commission Guidelines state that "the Commission will focus on encouraging and educating broadcasters to clearly identify editorial content from news content". What is not clear is whether the phrase noted above is directed at broadcasters or the regulator. This is a matter of some importance given that media outlets have been suspended or banned in Iraq allegedly for supporting terrorist groups by carrying their messages.

We welcome, in regard to the above, the statement in the draft Guidelines that "[i]n considering the proper remedy, the Commission will always remember that its role is to foster the development of free and independent media, even in the face of a hostile situation." This guiding principle should not be lost in any subsequent drafts.

Sanctions

Under Section 2.3, sanctions may range from a requirement to broadcast a correction or apology to the imposition of a fine and 'closure of operations'. Imprisonment is not available.

While we welcome the gradation of different sanctions available, ARTICLE 19 believes that it can never be legitimate to ban print media outlets, which "denial of entry into premises" and/or "seizure of equipment" would effectively do. Normally, serious abuses by print media outlets will lead to the personal responsibility of those involved, or at least the editor-in-chief, and this is sufficient punishment. We understand that one of the assumptions behind the draft Media Law is that the court system is not functioning properly but this cannot be a legitimate ground for breaching the above. We note, again, the extremely poor precedent this would set for a country at the very beginning of an as yet only potential transformation to democracy. We also note that fines, for which no limit is set out in the draft Law, are an effective way of deterring serious abuses. Finally, we note that the draft Elections Code (discussed below) does provide for different sanctions for broadcasters and other media outlets.⁵⁴

For broadcasters, it should be clear that suspension and licence cancellation are considered to be extreme penalties, available only in the very most extreme circumstances when other less intrusive sanctions have failed to prevent the abuse. Sanctions such as "denial of entry into premises" and "seizure of equipment" for broadcasters, should be contingent upon a suspension or licence cancellation. It would

⁵³ *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para 54.

⁵⁴ Article 13 of the Code for Media During Elections.

be preferable if actions such as these were not taken by the NCMC itself, but through the existing justice system as a way of enforcing a licence cancellation.⁵⁵

Recommendations:

- The offence of imminent incitement to hatred should be described in clear and unambiguous terms.
- The offences of diverting police or other public order forces and of advocating terrorism or crime should be removed from the draft Law.
- The Guidelines should give clearer guidance on the difference between reporting of statements by others and the active dissemination of statements with an intent to incite, and it should be clear that simply reporting the statements of others, even where those statements are themselves illegal, is not, of itself, illegal.
- The forcible closure of a print media outlet should not be available as a sanction.
- The suspension or closure of broadcast media should specifically be made contingent upon gross and repeated breach of the law which other sanctions have failed to redress.
- Sanctions such as denial of entry and seizure of equipment should, for broadcasters, be contingent upon suspension or closure.

III.2.2.2 Defamation

Section 3 of the draft Media Law states:

- 3.1 Any individual, legally-established business or other legal entity that believes in good faith that a false statement of fact published or broadcast by a Media Outlet has caused injury to his or its reputation has the right to file a complaint, as set forth herein, against the Media Outlet that published or broadcast such statement.
- 3.2 The following do not have standing to file a defamation action:
 - (a) Government agencies.
 - (b) Government officials, where the published or broadcast statement concerned their official capacity.
 - (c) Persons claiming an offence on behalf of another party; for instance, the state or nation, an institution, a group that is not a legal entity with the right to sue and obligation to defend itself against suit, a family (though individual members can be defamed), a deceased person, or a patriotic or religious object.
 - (d) Persons or parties allegedly protecting an interest other than their own reputation; for instance, public order, national security or the honour of an institution, group or religion.
- 3.3 In the case of a complaint brought by any public official (who is not prohibited from bringing a claim under Section 3.2), any public figure, or any party where

⁵⁵ We note that while the application of the rules on incitement and defamation may be complex and human rights sensitive, the enforcement of an NCMC decision to suspend a broadcaster through these measures is quite different in nature.

the statement at issue was published or broadcast in a matter of public interest, the complainant must prove malice. To prove malice, the complainant must present convincing evidence that the alleged defamer knew that the statement was false, or recklessly disregarded clear indications of falsity, and published the statement nonetheless. All other complainants must prove negligence.

3.4 The following shall be defenses to complaints of defamation:

(a) Truth. No liability shall be found for truth, no matter how defamatory the statement. The burden is on the complainant to prove falsity.

(b) Good faith. No liability shall be found where the statement was believed to be true by the Media Outlet after generally accepted standards of professionalism were followed at the Media Outlet to investigate the veracity of the statement.

(c) Opinion. No opinion shall be the basis of liability, even insulting or offensive ones. The factual basis of the opinion may be the basis of liability if statements about those facts meet the standard for a defamation claim set forth herein.

(d) Privilege. No liability shall be found in connection with an accurate account of statements made by any government official or agent, including police and those in the judiciary, in the course of performing their duties.

(e) Statute of limitations. A complaint of defamation must be brought within six months of the date of the publication or broadcast, or claims in connection with such publication or broadcast shall not be actionable under this Section.

We welcome the clear intention of the drafters to word this section in accordance with the highest international standards. We offer the following suggestions to further improve its provisions.

First, it would be preferable if Section 3.1 were to include a link to the actual elements of the legal action for defamation, so that it is perfectly clear that the right to bring a complaint does not imply redress unless the conditions set out in the rest of the section are met.

Second, we are not clear what the aim is of the requirement that claims be brought “in good faith”. It may be that this is aimed at providing a court or the NCMC with a means of ‘throwing out’ claims that constitute an abuse of process – for example, a claim that is brought purely as a form of harassment on the defendant (it is not unknown for claimants to attempt to silence their critics purely by bringing a series of legal claims, forcing the critic to defend their statements in courts, which can sometimes have the effect of bankrupting the critic in the defence of his statements).⁵⁶ If this is the aim, that needs to be made clear. In particular, in this case, the good faith relates to the desire to protect reputation (as opposed to a desire to harm the defendant) rather than the belief that the statement is false. It would probably, in any case, be preferable for the possibility of summary dismissal of complaints to be set out in a separate section, detailing the procedure.

⁵⁶ See *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, ARTICLE 19, London: 2000, Principle 19.

Third, while we welcome the prohibition on claims being brought by government agencies, deceased persons, patriotic or religious objects or persons bringing claims on behalf of ‘the state’ or on grounds such as public order, we believe that there is some scope for improvement in Section 3.2. In addition to the persons currently named as unable to sue in defamation, we would suggest that no public body or body established and/or funded through public funds (not just State agencies) should have the right to sue in defamation.⁵⁷ We also recommend that political parties (as opposed to individuals) should be barred from bringing defamation cases: “Defamation actions or the threat of them would constitute a fetter on free speech at a time and on a topic when it is clearly in the public interest that there should be none.”⁵⁸ While individual party members maintain the right to sue in defamation, political parties, like the government, must defend their reputations in other ways.

Fourth, while we understand the intention behind the prohibition on government officials bringing claims in relation to criticism on their official functioning, we do not believe that an absolute prohibition can be justified. This would open the door to the most outrageous and unfounded claims of misconduct in public office – for example, the embezzlement of billions of dollars in oil revenues – without the defamed person having an opportunity to clear their name in court. This would probably constitute a violation of Article 17 of the ICCPR, which obligates States to take measures to allow individuals to defend their reputation. It is worthwhile to recall that while public officials must tolerate a substantially greater extent of criticism than ordinary persons,⁵⁹ this should not be taken to imply that they should be open to limitless, malicious and unfounded criticism.

Fifth, we welcome the inclusion of the defences of truth, good faith, opinion and privileged reporting, and the clear statement in Section 3.4(a) that the burden to prove falsity of a statement is on the claimant. We note that it is implicit in the defence of ‘good faith’ that it applies even where the statement turns out to be false; it would be good if this were stated explicitly.

With regard to privileged statements, it should perhaps be made clearer that officials are not themselves generally protected against defamations issued in the course of performing their duties, although certain officials in certain circumstances should be (for example, parliamentarians in parliament or police officers in court). In addition to statements made by government officials or agents, we would recommend that the following should benefit from an absolute privilege:

- i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;

⁵⁷ See, for example, *British Coal Corporation v. National Union of Mineworkers*, 28 June 1996, unreported (French J. English Queen’s Bench Division); *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.*, (1997), Judgment No S.C. 199/97, p. 9 (Supreme Court of Zimbabwe); and *Die Spoorbond and Anor. v. South African Railways*, [1946] AD 999, pp. 1012-1013.

⁵⁸ *Goldsmith and Anor. v. Bhoirul and Others*, [1997] 4 All ER 268, at pp. 270-71.

⁵⁹ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82 (European Court of Human Rights).

- ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
- iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
- iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
- v. any document ordered to be published by a legislative body;
- vi. a fair and accurate report of the material described in points (i) – (v) above; and
- vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.⁶⁰

It is widely recognised that on certain occasions it is in the public interest for people to be able to speak freely without fear or concern that they may have to answer in court for what they have said. The statements described under points (i)-(v) above are exempted from liability under defamation law in many countries and have been recognised by international courts as necessary for the protection of freedom of expression.⁶¹ It is also of the greatest importance that newspapers and others are able to provide the public with fair and accurate reports of these statements and documents, as well as of certain other official material, even where the original authors are not protected.

Recommendations:

- It should be made perfectly clear that, for those bringing a defamation case, redress is contingent upon meeting the conditions set out in Section 3 as a whole.
- The term ‘good faith’ in relation to bringing a complaint should be substituted by a clear provision allowing for summary dismissal of a defamation case for abuse of process.
- In addition to the bodies already prohibited from being an action for defamation, the draft Media Law should prohibit all public bodies and bodies established or funded by the State, as well as political parties, from bringing defamation actions.
- Government officials should not be prohibited altogether from bringing an action related to their public functioning, but they should be required to tolerate far greater levels of criticism than ordinary individuals, as provided for in the draft Law.
- The draft Law should make it clear that the defence of good faith applies even if the statement in question happens to be false.
- The defence of privilege should be extended to cover the statements noted above, while it should be made clear that, outside of these cases, officials do not benefit from the privilege (although those accurately reporting their statements do).

⁶⁰ *Defining Defamation*, note 56, Principle 11.

⁶¹ See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99 (European Court of Human Rights); *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (European Court of Human Rights); and *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 (European Court of Human Rights).

III.2.4 Repeals

Under Sections 5 and 6 of the draft Media Law, CPA Order No. 14 will be repealed in its entirety and a number of Penal Code provisions that penalise defamation and various forms of incitement are also repealed.⁶²

We welcome these repeals unreservedly.

We would like to suggest that, in addition to the provisions mentioned, serious consideration be given to repeal of the following provisions as well:

- Article 228 Penal Code, which penalises the publication of the proceedings of ‘secret’ sessions of the legislative assembly; and
- Articles 16(1), (3)-(6) and (11) and the whole of Articles 17 and 19 of the Law on Publications, which penalise various forms of defamation and incitement.⁶³

Recommendation:

- All remaining provisions in pre-2003 Iraqi law that penalise defamation or incitement or that contradict the principle that parliamentary proceedings can be reported under the enjoyment of an absolute privilege against defamation should be repealed.

III.2.5 Sunset Clause

Under Section 7, the Media Law will be repealed on the 30th day following the date on which the official results of the elections have been publicly announced for the first time. Sections 5 and 6 of the draft Media Law, which repeal criminal defamation provisions and CPA Order No. 14 are not subject to this provision and are therefore permanently repealed.

We appreciate that this ‘sunset clause’ is intended to provide the new legislative assembly with an opportunity to consider the introduction of new legislation. At the same time, we question whether 30 days is sufficient for this to be achieved. The drafting of a permanent legal framework for defamation and incitement to violence and its subsequent passage through parliament is a serious undertaking that cannot be accomplished in 30 days. We would recommend that at least a year be set aside for this purpose. Persisting in the thirty day-period will result in the new legislative assembly merely affirming the Interim Media Law for an indefinite period, which we do not consider would be appropriate and which clearly runs counter to the intention of Section 7.

Recommendation:

⁶² The following Penal Code provisions will be repealed: Articles 179-180, 200-202, 208, 210-215, 225, 227, 229, 305, 372(1), 372(4)-(6), 433-435 and Article 438.

⁶³ Law No. 206, 1968. Note that in our February 2004 Memorandum we recommend the repeal of the entire Law on publications as it constitutes a regulatory regime for the print media that is not compatible with the right to freedom of expression.

- The sunset provision should allow the new legislative assembly at least one year to introduce permanent legislation.

III.3 Interim Broadcasting Code of Practice

Acting under CPA Order No. 65, on 27 July 2004 the NCMC issued an Interim Programme Code of Practice for Broadcasters. The Interim Code lays down a number of principles dealing with issues such as decency, non-discrimination, fairness, accuracy and balance in broadcasting. The Code also prohibits broadcasting material that may incite, represent or portray violence or ethnic, national or religious intolerance. According to NCMC Decision Number 040727-01, the Code was enacted on an interim basis in order to seek comments from broadcasters, the government, and the public generally, and to refine the Code in light of those comments. While publication of a draft code for consultation might have been preferable, the Commission believed that this would leave broadcasters in the dark as to the appropriate programme standards. We have been informed that the consultation period has been extended from the original 30 September deadline to the end of November.

The Code contains six principles on programme content, a provision granting a right of reply, a provision guaranteeing the right to access information and broadcasters' freedom to publish, a provision dealing with copyright restrictions and a provision requiring broadcasters to keep tapes of all recordings for at least 45 days. There appears to be no distinction between radio and television broadcasters. Enforcement of the Code is through Section 9 of CPA Order 65 – which allows the NCMC to impose sanctions ranging from the imposition of a warning to licence termination – and the NCMC Rules of Procedure.

III.3.1 General Comments

In general, we are struck by the minimal nature of the Code. A document such as this is meant to provide guidance so that broadcasters will know what kind of programming is acceptable and what is not. Unlike a law, whose operative clauses would generally be stated in fairly brief and direct terms, codes of practice are normally much more elaborate, sometimes even providing examples to illustrate their meaning. A code of practice is meant to give guidance to broadcasters as much as to form the basis for enforcement. This is particularly important in the present circumstances in Iraq, when broadcasters, regulators and the general public all need to learn about the acceptable standards for broadcasting in a democratic society. The general 'disclaimer'⁶⁴ on the front page of the Code that it "is not a complete guide to good practice in every situation, nor does it say everything that can be said on the topics it covers..." strike us as somewhat odd in this context. The Code should strive to be fully comprehensive and cover every conceivable angle, particularly given the circumstances of present-day Iraq. Our comments in Section III.3.2 discuss this in further detail for each of the principles.

⁶⁴ The same disclaimer features on some of the NCMC's other codes and guidance.

We attach, in the Annex to this Memorandum, a draft code which appears to us to strike a balance between the very brief provisions in the Code under consideration here and something far more detailed, such as the BBC's Producers Guidelines. This is intended as an example of how more detail can be included; we are in no way suggesting that this is a model code or a code that would be appropriate for Iraq.

A second general point is that separate standards should be developed for radio and television. The Interim Code appears to set the same standards for both radio and television broadcasting, which is problematic. Although the general subject matter of the codes would be similar (accuracy and fairness, privacy and so on) the very different nature and impact of radio and television broadcasting necessitates separate standards. The need for separate codes will become apparent when more detailed guidance is developed.

Third, there do not appear to be any provisions dealing with programme sponsorship and advertising generally. In many transitional democracies, the broadcast media become linked to commercial interests and it is important to have clear and detailed rules on the amount of advertising and sponsorship allowed. The Code should also make it clear that news and current affairs programming should not be allowed to be sponsored and particular rules for advertising in relation to such programmes should be considered (although advertising may be allowed in slots preceding or following a news or current affairs broadcast).

Recommendations:

- The Code should be significantly elaborated so as to provide detailed guidance, set out in clear and unambiguous terms, on acceptable programme standards.
- The Code should provide appropriately differentiated standards for radio and television.
- Programme standards should be developed on commercial sponsorship and advertising.

III.3.2 Programme Content

The six principles on programme content are set out in Section 1 of the Code, as follows:

- Section 1.1 prohibits incitement to violence;
- Section 1.2 requires broadcasters to uphold standards of decency and civility;
- Section 1.3 requires broadcasters to ensure due accuracy and fairness in broadcasting;
- Section 1.4 requires broadcasters to make an effort to ensure that programmes about religion are accurate and fair;
- Section 1.5 requires broadcasters to exercise care and consideration in matters involving the private lives and dignity of individuals; and
- Section 1.6 requires broadcasters not to broadcast any material they know to be false or deceptive.

We discuss each of these principles in turn below.

III.3.2.1 Incitement to violence

The operative paragraphs on incitement to violence are similar to those found in the draft Interim Media Law, prohibiting broadcasters from broadcasting any material that carries a clear and immediate risk of inciting imminent violence, ethnic or religious hatred, civil disorder or rioting or that advocates crime, terrorism or criminal activities, or that carries the risk of diverting the emergency services from their normal duties.

We repeat our concern with regard to the vague nature of the prohibitions on incitement of ethnic or religious hatred, and to the inappropriateness of blanket prohibitions on broadcasting material that ‘advocates’ terrorism or that diverts the police from their duties. We also reiterate the need for clearer standards on broadcasting the statements of others, particularly in this context.⁶⁵

We are concerned that a crucial element that protects broadcasters which is found in the draft Interim Media Law is missing here. Section 2.2 of the draft Interim Media Law states: “Any material that is merely offensive or insulting, but does not meet the standard set forth above, shall not create any liability under this Section ... The dissemination of material followed by an act of violence, an act of ethnic or religious hatred, and act of civil disorder or rioting among the people of Iraq or advocates terrorism, crime or criminal activities that was not intended or could not reasonably have been foreseen to have the immediate consequence of such an act shall not be the basis of liability under this Section ...” This is positive guidance which also needs to be included in the Code.

Finally, we welcome the general terms of the draft Guidelines for Broadcasters on Incitement to Violence, Ethnic or Religious Hatred, Civil Disorder or Rioting (which we comment on in Section III.2.2.1, above).

Recommendations:

- The Code should offer guidance on what constitutes incitement in clear and unambiguous terms, including a statement that material that is merely offensive or insulting does not constitute incitement.
- Consideration should be given either to removing the statements on advocating terrorism and diverting the police from their duties or, at a minimum, greater detail should be provided on these rules.
- Further elaboration of the rules relating to broadcasting the statements of others should be included in the Code.
- The draft Guidelines for Broadcasters on Incitement to Violence, Ethnic or Religious Hatred, Civil Disorder or Rioting should be incorporating into the Code.

⁶⁵ See Section III.2.2.1 of this Memorandum.

III.3.2.2 Decency and civility

Section 1.2 of the Code states:

Broadcasters shall observe general standards of decency and civility in programme content and scheduling, taking particular care to protect the interests and sensitivities of children and minors. Material unsuitable for children, including pornography or gratuitous violence must not be transmitted at times when large numbers of children may be reasonably expected to be watching or listening.

Broadcasters must show consideration when reporting the effects of natural disaster, accident or violence. Broadcasters must balance the wish to serve the needs of truth against the risk of sensationalism, causing distress or the possibility of unwarranted invasion of privacy.

These two paragraphs state a number of important principles which, while we do not disagree with them, are stated in terms that are far too general to give meaningful guidance to broadcasters, particularly in the transitional context which currently pertains in Iraq. The following elements in the first paragraph need to be elaborated separately in the Code, in some detail:

- what is meant by ‘general standards of decency and civility’, both on its own and in the context of what may be appropriate for minors;
- what constitutes ‘gratuitous violence’;
- what constitutes ‘pornography’;
- which are the times at which children may be expected to be watching.

In the UK, for example, 9pm is established as the watershed, after which a progressive relaxation of the rules relating to child viewing is implemented. The relevant code gives detailed guidance in this regard, for example setting presumptive times for the showing of differently classified films.

The second paragraph is also in need of further elaboration, particularly given the frequent occurrence of such events in Iraq. Guidance along the lines of that given in the guidelines on reporting sensational events may be useful here, too: while the Code should state that broadcasters should report on events that are newsworthy, they should do so in a way that minimises undue redress for victims, for example.

Recommendations:

- The notions of decency and civility need to be elaborated in far more detail, both in relation to what is acceptable viewing for minors but also regarding the acceptable limits for adults.
- The Code should give further guidance on how in practice broadcasters can report on natural disasters, accidents or violence without crossing over into sensational reporting.

III.3.2.3 Fair and impartial programming

Section 1.3 states:

Broadcasters must ensure due accuracy and fairness in all programming, including news. Opinion should be clearly distinguished from fact. News reporting should be dispassionate and news judgments based on the need to give viewers and listeners an even-handed account of events. Sensitivity will be exercised in broadcasting images of or interviews with bereaved relatives and survivors or witnesses of traumatic incidents.

This principle is elaborated by another draft set of Guidelines, on Accuracy and Balance.⁶⁶ These provide some more detailed guidance, elaborating on different ways in which bias can be displayed and explaining that while balance does not necessarily require giving equal time to all points of view on an issue, it does require giving an accurate and unemotional summary of the facts or viewpoints that are central to a story.

As elaborated in the draft Guidance, this provides a good starting point for broadcasters. Some further elaboration might be useful, however, on a few points. For example, the Code could point out that, in relation to the broadcast of a series of programmes, the duty of balance should be understood as applying to the series as a whole. In relation to interviewing politicians, for example, it may well be appropriate to interview a politician on a particular subject matter which is subsequently critically explored in the rest of the programme without necessarily needing also to seek the points of view of other politicians. Also, it should be clear that sensitivity regarding relatives, survivors and witnesses is in relation to those people, not society at large; if a relative consents to the portrayal of a story, for example, publication is legitimate.

The Code should also make it clear that the requirement to be balanced and impartial does not mean that all broadcasts will need to be cool and calm in tone: there will still be a place for political satire and programming that may seem ‘offensive’ to some. As the European Court of Human Rights has stated:

Journalistic freedom ... covers possible recourse to a degree of exaggeration, or even provocation.⁶⁷

This means that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.⁶⁸

We also note that the draft Guidance is almost wholly aimed at news and current affairs broadcasting. While these are issues in relation to which the importance of fairness and impartiality is probably at its highest, it would be good if the Guidance also paid attention to other forms of broadcasting.

Recommendations:

- The draft Guidance on Accuracy and Balance should be incorporated within the Code.

⁶⁶ Undated; the header states ‘for discussion purposes only’.

⁶⁷ *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

⁶⁸ See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.

- The Code/Guidance should provide some further elaboration on broadcasting a series of programmes, interviews with politicians, sensitivity to relatives and victims and the use of satire and hyperbole, in line with the comments above.
- The Code should make it clear that the media are not required to be cool and calm in all of their reporting and that these notions are relevant primarily to the requirements of balance and impartiality.

III.3.2.4 Religious programmes

Section 1.4 states:

Effort must be made to ensure that programmes about religion or religious groups are accurate and fair. The belief and practice of religious groups must not be misrepresented. Programmes must not denigrate the religious beliefs of others.

We have seen no further draft Guidance elaborating on this broadly stated principle. Our overall comment is, again, that, as stated, the principle is too general to provide meaningful guidance to broadcasters. It needs further elaboration, making clear at a minimum that critical discussion about religion is permissible. It should also provide guidance on matters such as how in practical terms, it is possible to support a particular religion while not simultaneously denigrating other religions. It may also be worthwhile to explain that there is no need to feature the viewpoints of all the different religions when discussing one. Practical examples should be provided.

The Code should also provide that programmes relating to religion should not improperly exploit any susceptibilities of those watching the programmes.

Recommendations:

- The section on religious programming should, at a minimum, make it clear that public discussion and criticism of religion is permissible. It should also provide practical advice on the implementation of the principle in practice.
- This section should also protect against improper exploitation in the context of religious programming.

III.3.2.5 Privacy

Section 1.5 states:

Broadcasters shall exercise care and consideration in matters involving the private lives and dignity of individuals, bearing in mind that the right to privacy and dignity may be overridden by a legitimate public interest. There is a public interest in freedom of expression itself, and the Commission will therefore have regard to the extent to which material has, or is about to, become available to the public. In cases involving children, broadcasters must demonstrate an exceptional public interest to override the normally paramount interest of the child.

Lacking any further guidance, we consider that this provision, too, is so general as to provide only limited guidance to broadcasters. Particularly puzzling will be the statement that “there is a public interest in freedom of expression itself” – something that broadcasters will generally agree with, but which is rather enigmatic as currently stated. Indeed, the Code should proceed from the proposition that freedom of expression is a key public interest and human right and all provisions should be understood in that light. Furthermore, the balance in relation to children appears to be wrongly stated or at least to be confusing. The balancing should be the same in all cases: where the public interest in the information outweighs the privacy interest, the information should be broadcast. The point is that privacy of children is very important, so that only an even more weighty interest will override it.

At a minimum, further guidance is needed on the meaning of ‘public interest’, a term which is problematic in any context and which is likely to be completely alien to both broadcasters and regulators in Iraq. Further elaboration would also be useful on a host of other issues, such as the use of hidden cameras and telephoto lenses. For an example of good guidance on privacy and related issues, we refer to codes of other regulators, such as OfCom in the UK, whose guidance begins by setting out the ‘competing’ human rights to freedom of expression and privacy.⁶⁹

Recommendation:

- The Section on privacy is both excessively general and unclear in points. The importance of freedom of expression and the issue of children’s right to privacy should, in particular, be clarified.
- Consideration should be given to providing further guidance on the meaning of the phrase ‘public interest’, as well as on other privacy issues.

III.3.2.6 False and deceptive material

Section 1.6 states:

Broadcasters must not broadcast any material that they know to be false or deceptive, or by reasonable inquiry could determine was false or deceptive. If broadcast material proves to be false or deceptive, a correction must be broadcast as soon as possible.

Guidance on the implementation of this principle is provided in the draft Guidelines for Broadcasters on Accuracy and Balance, which stipulate that broadcasters must check their facts before broadcasting them and issue corrections as soon as they are aware of a mistake. The Guidelines further explain: “The more sensational the allegation, the more work the broadcaster and its journalists are expected to put into verifying the truth (or learning the falsity) of the claim. It is a widely accepted rule of journalism that any controversial assertion of fact should be backed up by two independent sources, whether the sources are local officials or international news agencies.” At the same time, the

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See http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/programmes/programme_code/pc_section_tw_o?a=87101.

Guidelines admit that in some cases, full confirmation will not always be possible, in which case the material may still be broadcast with a disclaimer that it “has not been confirmed by independent sources.”

This is a thorny issue and, in our view, the Code takes to stringent a position regarding accuracy, in particular by imposing a standard pursuant to which, if “reasonable inquiry could” show a story was false, the broadcaster will be in breach. The elaboration of this in the Guidelines suggests that two sources are normally required for a story, which is not necessarily consistent with international best practice, and is misleading by referring to local officials and international news agencies as examples of such ‘independent sources’.

In fact, there is a considerable range of intermediate territory here and international human rights courts have recognised that the fast pace of news and current affairs broadcasting does not always allow for full and exhaustive fact-checking to take place:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.⁷⁰

First, there will be situations where the importance of timely reporting overrides the double source, or indeed any reliable source, rule. This is very much the case in the context of military or terrorist actions, common in Iraq. The most cursory review of broadcasting in the aftermath of the attacks of 9-11, which attracted very little criticism and no regulatory response despite massive and crucial inaccuracies, illustrates this point. The tenor of the Code and Guidelines do not reflect this.

Second, the manner in which material is presented is very important and goes far beyond the proposed disclaimer that a statement “has not been confirmed by independent sources”. This should be made clear in the Code and, indeed, it might be useful to present some of the ways in which seasoned broadcasters deal with stories which are unconfirmed and yet which must be carried in a timely manner in the public interest.

Third, as alluded to above, the Guidelines are seriously misleading in relation to reliable or independent sources. Local officials may be a reliable source in some cases but, equally, will not be in others, for example where the story may reflect poorly on their competence or, worse, honesty. An ordinary person who is a direct witness is a perfectly independent and normally reliable source. The Code should make this clear.

Fourth, this section fails to address the question of when it is permissible to broadcast stories reported by others – whether domestic or foreign – appearing to include these under the same rule as original reporting. It is often not possible for broadcasters to verify stories circulated by news agencies, for example. Even in the context of reports

⁷⁰ *The Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88 (European Court of Human Rights), para. 60.

from less reliable sources which have been repeated, international human rights courts have frequently found for the broadcaster, rejecting the position of national courts.⁷¹

It is important that the Code, incorporating the Guidelines, should be more specific with regard to all these issues. It should also give practical examples of situations where it would not be professional for a news outlet to publish material without checking the facts exhaustively and of situations in which it might be.

Recommendations:

- The Guidelines should be incorporated with the Code and provide more detailed and practical guidance.
- The Code should make it clear that there may often be situations where reliable accuracy is not possible but the material should still be broadcast in the public interest. In such situations, there are a number of ways in which the fallibility of the material may be communicated to the public; the Code should provide some guidance on this.
- The references to particular types of sources in the Guidelines should be reconsidered and it should be clear that what constitutes an independent and reliable sources will depend on all of the circumstances but that any ordinary person might qualify.
- The issue of accuracy in relation to the re-broadcasting the statements of others should be addressed in the Code, in line with the statements above.

III.3.3 Right of Reply

Under Section 2, “[a]ny person who can show that he or she has been unjustly placed in an unfavourable light by broadcast material” may petition the Commission claiming a right of reply. If the Commission finds that such a right is warranted and the petitioner does not have an alternate means of reaching the public, the broadcaster may be ordered to afford that person a “reasonable” right of reply.

The right of reply is a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose rights have been harmed by the publication of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence. It is undisputed that a legally enforceable right of reply constitutes a restriction on freedom of expression as it interferes with editorial decision-making. As such, it must meet the strict three-part test set out above and a number of minimum requirements should apply. ARTICLE 19, together with other advocates of media freedom, suggests that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply, namely:

⁷¹ See, for example, *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97 (European Court of Human Rights); *Ulloa v. Costa Rica*, Judgment of 2 July 2004, Series C No. 107 (Inter-American Court of Human Rights).

- (a) A reply should only be available to respond to incorrect facts or in case of breach of a legal right, not to comment on opinions that the viewer/listener doesn't like or that present the reader/viewer in a negative light.
- (b) A reply should not be available where a correction or refutation suffices.
- (c) The reply should receive similar, but not necessarily identical prominence to the original article.
- (d) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
- (e) The media should not be required to carry a reply which is abusive or illegal.
- (f) A reply should not be used to introduce new issues or to comment on correct facts.

Against these standards, we have certain concerns about the proposed right to reply scheme in the Code. First, the threshold for the reply appears to be set at an unacceptably low level.⁷² A right of reply should be available only where a person's rights have been affected by the publication of inaccurate information; not when a person is "unjustly placed in an unfavourable light". A story about a corrupt official which failed to mention mitigating circumstances, for example, debts or problems at home, may be considered to be "unjust", a term which is extremely subjective in nature, but should not be the basis for a right of reply.

Second, the conditions under which a right of reply may be granted are wholly unclear. The Code proposes that a "reasonable" reply should be afforded but fails to place any limits on the length of the reply, when it should be broadcast, or whether it may include facts not known at the time of the original broadcast. It is also not clear what is meant by the requirement that a person may be granted a reply if he has no "alternative means of reaching the public". Presumably this is to counter situations in which a politician who already has the means to respond to an inaccurate media report might claim a right of reply. This needs to be clarified.

Third, we recommend that a right of reply be available only where the far less intrusive remedy of a right of correction is insufficient to redress the harm done. An important difference between a right of reply and a right of correction is that the broadcaster exercises far more control over the presentation of the latter; a correction as a remedy is therefore far less intrusive in terms of the right to freedom of expression. Where the wrong consists of a simple mistake and may be fully addressed through the correction of that mistake, this is a more appropriate means of addressing the problem.

Recommendations:

- The right of reply provision should be redrafted to reflect the standards set out above. The Code should, in particular, set out clearly the narrow circumstances under which the right may be claimed and how it should be exercised.
- The limitation on claiming a right of reply where other avenues of reaching the

⁷² The provision is phrased in terms allowing a person to lodge a complaint with the Commission in certain circumstances, without stating clearly what in evidential terms needs to be shown before the Commission may grant the request.

public are available should be clarified.

- The Code should recognise that where a correction has been given which redresses the harm done, no right of reply should be available. Alternatively, consideration might be given to providing for an enforceable right of correction in the Code as an alternative to the right of reply.

III.3.4 Access to Information and Freedom to Publish

Section 3 of the Code restates Article 19 of the UDHR, noting that “broadcasters’ freedom of access to information and their freedom to publish should conform [to its terms]”. There is no further guidance on the meaning of this in practice.

As drafted, this provision serves little purpose. There is no explanation of what “freedom of access to information” might mean in practice and no guidance is offered as to what broadcasters’ “freedom to publish” implies.

In order for a provision such as this to be meaningful, it should be frontloaded in the Code, thereby making it clear that the Code is not only consistent with, but is informed by, the right to freedom of expression, a fundamental human right. The Code should refer to the pivotal importance in a democracy of the right to freedom of expression and point out that this right is protected under Iraqi law as well as under international law binding on Iraq. It should also set out internationally accepted standards relating to restrictions on freedom of expression, and what that implies in terms of broadcast regulation. Where helpful, operative parts of the Code might refer to ‘competing’ human rights – for example the right to respect for private life – and give guidance on how such ‘competing’ rights may be reconciled.

Recommendation:

- References to freedom of expression as a human right should be frontloaded in a way that makes it clear that broadcast regulation must respect, both in law and in practice, this fundamental human right. There should be references to the fundamental status of freedom of expression in a democracy, as well as to the international three-part test for restrictions on freedom of expression.

III.4 Draft Code for Media during Elections

The media are particularly important in time of elections. Candidates for political office must be able to get their political message across freely and the media provide them a crucially important platform for doing so. In addition, the media play an important role in reporting and analysing the policies and backgrounds of political candidates. If, during an election, a large number of political candidates cannot make their voices heard or the editorial independence of the media is interfered with, democratic elections have failed.

For these reasons, international courts have emphasised the role played by the media during elections. As noted by the UN Human Rights Committee, “the free

communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”⁷³ The European Court of Human Rights has observed:

Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature”. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.⁷⁴

Implementing these principles in practice requires a mix of regulation and a large degree of media freedom. Regulation is necessary to ensure such matters as equitable access to the broadcast media and to provide a speedy right of reply where a candidate is defamed; media freedom is necessary in order to ensure the free and open discussion required to ensure that candidates can get their message across and that the electorate is sufficiently informed. Getting this mix right is crucial: over-regulation will result in stifling the political debate while under-regulation may result in a situation where candidates with access to funds are able to ‘buy’ media platforms and become the dominant voice in the debate.

It follows that the draft Code for Media during Elections is a key instrument. Seeking to achieve the right balance, it imposes a number of obligations on all media, requiring fair and balanced reporting of electoral issues, imposing a ‘day of reflection’ prior to the polls, prohibiting incitement and disruption of the electoral process and imposing a right of reply scheme. Other provisions apply to the broadcast media only, requiring that they provide equitable access to political parties or candidates, while two provisions are aimed at the network of public service broadcasters, the Iraqi Media Network, which will be required to organise and broadcast election debates, as well as to provide free access slots for political parties and/or candidates.

With elections announced for 30 January 2004, it is important that the Code is finalised quickly; but it is equally important that it achieves the right regulatory balance. We discuss various provisions of the draft Code in the following paragraphs, offering suggestions and recommendations for improvement throughout.

III.4.1 Fair Reporting

Article 3 of the Code requires all media to provide factually accurate, balanced, fair and unbiased reporting. All media are required to treat political entities and their coalitions fairly and impartially, showing no favour or prejudice towards any of them and “making

⁷³ General Comment 25, The right to participate in public affairs, voting rights and the right of equal access to public service, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

⁷⁴ *Bowman v. the United Kingdom*, 19 February 1998, Application No. 24839/94, para. 42 (references omitted).

an effort to hear and represent” all sides to a debate. Article 10 imposes the related obligation that the media must allow all candidates “equitable access”.

The second paragraph of Section 3 requires all media clearly to distinguish editorial opinions from fact. Any endorsement of a political entity, coalition or candidate should be clearly marked as such and not be presented in a manner such that it could be confused with news coverage.

While we welcome the requirement on broadcast media to be fair and impartial in their coverage of elections, we are of the view that any attempt to extend this principle to the print media represents a breach of the right to freedom of expression. It is internationally established that the press is free to have a distinct political leaning.⁷⁵ The only exception is print media outlets owned or financed by public authorities. Since such media are controlled by the State, they are under an obligation to serve the public by offering broad and unbiased coverage.⁷⁶

With regard to broadcasters, the Code should elaborate on the particular importance of fairness and balance in relation to news and current affairs programming, including discussion programmes, such as interviews or debates. At the same time, it should be made clear that the requirements of fairness and balance leave the principle of editorial independence intact. The regulator cannot require a particular form of reporting; all that it can do is require that whatever form of reporting is adopted results in fair and balanced coverage. Breach of this rule may lead to the imposition of sanctions but only in response to that breach (that is, not as a matter of prior censorship).

Finally, given the acknowledged potential for editorial opinions to be confused with news, we recommend that the Iraqi Media Network should not broadcast any editorial opinions at all in relation to the elections.⁷⁷ Indeed, it may be questioned whether it should ever do this.⁷⁸

Recommendations:

- The Code should stipulate that privately owned print media remain free to pursue an editorial policy that is not impartial or balanced.
- The Code should elaborate on the importance of fairness and balance in relation to news and current affairs broadcasts, as well as discussion programmes.
- Publicly-owned media should not broadcast any editorial opinions in relation to the elections.
- The Code should stipulate that its rules do not compromise the editorial independence of the media and that, as regards review of material, the regulator

⁷⁵ See, for example, Council of Europe Recommendation (99)15, On Measures Concerning Media Coverage of Election Campaigns, 9 September 1999.

⁷⁶ *Ibid.*, Principle I.2. This does not extend to publications such as a State gazette which publishes only legislation, statistics and other factual information.

⁷⁷ *Ibid.*, Guideline 8.2.

⁷⁸ See, for example, the prohibition on the expression of editorial opinion by the BBC: BBC Agreement, Paragraph 5.1.

may only intervene *post facto* and may not impose a system of prior censorship.

III.4.2 Paid Political Advertisements

Article 4 prohibits all paid political advertising in the broadcast media. This prohibition is conditional upon the successful introduction of the requirement that the Iraqi Media Network will provide free access slots to candidates. Other broadcasters may air advertisements but they must do so free of charge, applying equal terms and conditions to all political candidates and their parties.

Media other than broadcast media may carry advertisements on rates that are equal to or below their lowest commercial rates, applying the same terms and conditions to all political parties and candidates.

All political advertisements must be clearly identified as such.

We wholeheartedly welcome the envisaged prohibition on paid political advertising in the broadcast media. While the broadcast media are an important vehicle in informing the public, allowing them to carry paid political advertising carries with it the real risk that those parties or candidates who are able to purchase the largest amount of airtime will gain an unfair advantage. If IMN can provide free access slots at prime viewing and listening hours, and organise political debates as envisaged in Article 7, broadcast advertisements will not be necessary.

However, we are somewhat concerned at the half-way position of the second paragraph of Article 4, which allows political advertising provided that the broadcaster receives no remuneration at all, including in-kind compensation. This allows a broadcaster to carry political advertising, but if it carries messages from one party or candidate, it must also carry messages from the others (if any are offered).

We are not sure this is a realistic option. It must be borne in mind, first, that producing advertising is expensive and not every party or candidate will be able to do this on their own expense. There will still be a danger, therefore, that richer candidates gain an unfair advantage. More importantly, we are concerned about the application of this in practice and, in particular, for whether the authorities will be able effectively to police this rule. A situation where a broadcaster provides access to a particular party or candidate, perhaps one who the owner has links with, and either refuses to provide the same slot to others or in some other way obstructs the right of other parties to such equal access would be difficult to address. We note that, in such cases, there are myriad subtle ways in which parties may be obstructed in their access and for which it would be hard to establish a clear breach of the rule. A very simple example would be the timing of the broadcasts. The NCMC and the electoral commission will have their hands full with other matters and while they can impose sanctions *ex post facto*, there is still a danger that the elections may be interfered with. For these reasons it would in our view be preferable to go for the simple option of prohibiting all political advertisements, whether paid or unpaid, with the exception of the free access slots on IMN.

Recommendation:

- The Code should prohibit all political advertising in the broadcast media with the exception of the free access slots on IMN stations.

III.4.3 Voter Education

Article 5 of the Code requires IMN to use its news and current affairs programmes for voter education. It must inform listeners and viewers about the policies of the various political parties and candidates as well as about “all political issues that require critical examination and discussion”.

We welcome this requirement but recommend that voter education be extended to more practical areas of information also: explaining the voting process; how, when and where to vote, to register to vote and to verify proper registration; the secrecy of the ballot (and thus safety from retaliation); the importance of voting; the right freely to exercise one’s vote; the functions of the offices that are under contention; election oversight and complaints mechanisms; and similar matters. IMN should also make sure that it reaches minority groups, including, if necessary, by broadcasting in minority languages and in programmes targeted for groups who may traditionally have been excluded from public life and the political process, such as ethnic or religious minorities or women.

Recommendation:

- Voter education should be expanded along the lines suggested above.

III.4.4 Direct Access for Candidates and Parties on IMN

Article 6 requires each IMN station to provide free air time to candidates and parties registered within their geographic area of coverage. Slots will be allocated through a lottery but all direct access programming will be broadcast at prime viewing or listening times. IMN will make available reasonable studio and technical facilities for purposes of production of these direct access slots.

We welcome this proposal. We note that the exact length of each slot has not yet been determined. We would emphasise that the slot needs to be long enough to allow political parties and candidates to communicate their message. We also note that a decision has not yet been taken on whether to allow free airtime to individual candidates as well as to political parties and/or coalitions. In our opinion, this will largely depend on the nature of the election – for a presidential election, it would make sense to allow slots for individuals, while parliamentary elections would call for access for parties – and the number of parties/candidates/coalitions. It must be borne in mind that the electorate will be confused as well as put off by an undue number of political slots; at the same time, the number of slots should not be so limited as to impede the capacity of parties/candidates to get their message across.

Recommendation:

- At some point, a decision will need to be made on whether to provide slots to individual candidates as well as to parties; this decision should strike a balance between ensuring sufficient coverage and not excluding different competitors, on the one hand, and overwhelming electors with an undifferentiated barrage of electoral information, on the other.

III.4.5 Debates

Under Article 7, each IMN station must organise, produce and provide airtime for at least one debate among the principal parties. Private broadcasters may also be allowed to broadcast debates.

All debates, whether run by IMN or by private broadcasters, must be run fairly. All parties in the broadcaster's geographic area must be invited and allowed to participate, the debate must be broadcast at a prime viewing or listening time, and scheduling and other issues of order must be determined by lottery. Any rules or conditions placed on the debate and any allowances or assistance in connection with the debate must be reasonable and be fairly applied to all parties.

We welcome this provision, which we believe will contribute greatly to informing the electorate. The requirement to invite all parties, while cumbersome, is important: given that at this stage in Iraqi politics there is no electoral track record, no-one should be excluded.

In addition to the various conditions elaborated in Article 8, we would recommend adding a requirement that journalists, experts and other questioners should be selected so as to ensure balance among the questions put to the candidates.

Recommendation:

- The selection of journalists, experts and other questioners should be required to be done in a manner that ensures balance among the questions put to the candidates.

III.4.6 Opinion Polls

Article 8 provides that media publishing the results of opinion polls should strive to report the results of these polls fairly, identifying the organisation that conducted the poll, who paid for and commissioned it, the methodology employed, the sample size, the margin of error and the dates of the fieldwork. In addition, the media should state that the poll reflected public opinion only at the time it was taken.

In addition, the reporting of poll results is prohibited for a period of 72 hours prior to the opening of the first voting stations.

We welcome this provision. Opinion polls can have a significant impact on voting patterns, especially where their significance is not adequately understood. In the situation of Iraq, we also welcome the 72-hour black-out period prior to voting. It has

been observed that the impact of polls is greatest in the days immediately preceding election day. For example, a prediction that one candidate will win by a large margin may incline voters who support that candidate to stay home, since he or she is expected to win anyway. Similarly, voters may decide to vote for the apparent favourite, on the theory that it is better to side with a winner, especially if voters are not convinced about the integrity of the ballot's secrecy.

III.4.7 Period of Silence

Under Article 9, there can be no media coverage of any political party, candidate or coalition in the 24 hours prior to the opening of the first voting stations; non-partisan information about voting is allowed.

While we welcome the prohibition on campaigning in the 24 hours prior to voting, we are concerned that this should not restrict the media themselves from discussing political or electoral issues. The exception provided for in Article 9, which allows the broadcast only of "non-partisan information about voting", may therefore be too strict.

Recommendation:

- The media themselves should not be required to refrain from discussing political or electoral issues on the 'day of reflection'.

III.4.8 Equitable Access

Article 10 requires all broadcast media to provide "equitable access, equitable presentation, and equitable coverage" of political parties and candidates, "including with respect to newsworthy events and election activities in which they are involved." A separate draft set of Guidelines explains:

"Equitable access," as that term is used in the Code for Media during Elections promulgated by the National Communications and Media Commission (the "Commission"), does not mean that each Political Entity must be allotted equal time. Indeed, larger Political Entities and Coalitions should be given greater exposure. Rather, "equitable access" is loosely defined as fair access that is proportionate to the significance of the Political Entity, Coalition or candidate, taking into consideration such factors as, for example, the number of candidates in such Political Entity or Coalition up for election, the territorial organisation and presence of such Political Entity, Coalition or candidate, and its cultural, political and historical significance. The Commission recognises that the prevalence and importance of Political Entities, Coalitions and candidates may vary from region to region.

The principle of equitable access should be applied with regard to all statements, events, activities and public interventions that are directly or indirectly part of electoral campaigns.

Statements and activities by persons occupying public offices, when made in their official capacity, should not be considered part of the electoral campaign. However, when these statements and activities publicise the achievements of or work done by a particular Political Entity, Coalition or candidate so that they may be exploited for

electoral purposes or used in support of an electoral platform, the time dedicated to covering them will be considered in determining whether equitable access has been provided.⁷⁹

We welcome this guidance, which sets an important principle. However, the Guidelines do not provide sufficient guidance on how, in practical terms, broadcasters should implement the principle, particularly in relation to the extra exposure enjoyed by incumbent candidates. This can be a real problem for broadcasters. One way of addressing this issue is through an ‘equal time’ rule or a right of reply in relation to official statements by those running for election which may be deemed to be of a campaigning nature. In 1994, building on experience gained in the first wave of democratic elections in central and eastern Europe, ARTICLE 19 drew up a set of Guidelines which suggest:

News coverage of press conferences and public statements concerning matters of political controversy (as opposed to functions of state) called or made by the head of government, government ministers, or members of parliament should be subject to a right of reply or equal time rules. This obligation acquires even greater force when the person making the statement is also standing for office.⁸⁰

In practice, this should mean that other leading candidates in the region should be given compensatory time to offset any campaigning advantages that may be enjoyed by incumbents, or those occupying official positions while running for election.

We also note that while Article 10 applies to the broadcast media, the Guidelines suggest that the principle of equitable access should be extended to the print media also. As explained in Section III.4.1, we do not consider that this would be appropriate.

Recommendations:

- The Code should provide guidance on how to deal with the problem of incumbent candidates automatically receiving more coverage than other candidates.
- The principle of equitable access should apply to the broadcast media only.

III.4.9 Incitement to Violence or Public Disorder

Article 11 states:

Media shall not use any material that by its content or tone carries a clear and immediate risk of disrupting the campaign or election process and inciting imminent violence, ethnic or religious hatred, civil disorder or rioting among the people of Iraq, advocating terrorism, crime or criminal activities, or causing public harm (such harm being defined as death, injury, damage to property or other violence, or the diversion of police, medical services or other forces of public order from their normal duties).

⁷⁹ Guidelines on Equitable Access as required by the Code for Media During Elections, undated draft.

⁸⁰ *Guidelines for Election Broadcasting in Transitional Democracies*, London: 1994, Guideline 8.3.

The NCMC's Guidelines for Broadcasters on Incitement and its Guidelines for Broadcasters on Reporting Sensational Statements and Events provide guidance as to how the NCMC will apply this Article 11 to all Media during the Campaign Period.

We comment on the similar provisions in the draft Interim Media Law and Interim Broadcasting Code in sections III.2.2.1 and III.3.2.1 above, and we repeat our concern with regard to the vague nature of the prohibitions on incitement of ethnic or religious hatred, and to the inappropriateness of blanket prohibitions on broadcasting material that 'advocates' terrorism or that diverts the police from their duties. We also reiterate the need for clearer standards on broadcasting the statements of others, particularly in this context.

We are also concerned about the slightly different definitions and terms used with regard to incitement in the Broadcasting Code, the Elections Code and the draft Interim Media Law. Under the Elections Code, which applies to all media, there is a prohibition on using material that incites, while the Broadcasting Code prohibits the broadcasting of such material. A more appropriate generalisation of the Broadcasting Code term would capture the 'disseminating' of such material. We also note that under the Elections Code, unlike the Broadcasting Code, the prohibition is on material that carries a clear and immediate risk of disrupting the campaign or election process and inciting imminent violence and that the former does not include the warning in the Broadcasting Code regarding carrying statements by certain groups that may incite violence. Finally, neither the Elections Code nor the Broadcasting Code include the statement in the draft Interim Media Law that protects material that is merely insulting, without reaching the incitement threshold.

It would be good if the incitement provisions in these various codes were streamlined. As currently drafted, they may result in confusion for both broadcasters and regulators. For fairly obvious reasons, we prefer the standards in relation to this issue provided for in the Elections Code.

Recommendation:

- The various laws and codes should adopt the same standards for incitement to avoid conflicting standards and to ensure that it is as clear as possible to the media what they must avoid.

III.4.10 Right of Reply

Article 12 provides an expedited right of reply for any political party or candidate "who can show that he, she or it has been unjustly placed in an unfavourable light by information disseminated by a Media outlet during the Campaign Period ..." If granted, the reply must be exercised as soon as possible, and in any event within the campaign period.

This provision is substantially similar to the right of reply provision in the Broadcasting Code, on which we comment in Section III.3.3. While we welcome, in principle, the provision of a right of reply within the campaign period, our concerns with regard to this

provision are the same as those we expressed with regard to the right of reply provision in the Broadcasting Code:

- The threshold for the reply appears to be set at an unacceptably low level. A right of reply should be available only where a person's rights have been affected by the publication of inaccurate information; not when a person is "unjustly placed in an unfavourable light".
- The conditions under which a right of reply may be granted are wholly unclear. The Code proposes that a "reasonable" reply should be afforded but fails to place any limits on the length of the reply, when it should be broadcast, or whether it may include facts not known at the time of the original broadcast.

Recommendation:

- We repeat here our recommendations concerning the right of reply in the Broadcasting Code, found at the end of Section III.3.3.

III.4.11 Liability for Statements Made by Candidates

During elections, it is essential that political parties and candidates be given wide scope to present their views and programmes to the public. The envisaged TV debates will probably lead to some heated discussion, and in direct access programmes political parties and candidates may likewise use strong and sometimes insulting language. The Elections Code is silent on the question of the extent to which media outlets may be held responsible for any statements made by political parties or candidates, whether in debates, free access slots or in other programmes.

ARTICLE 19 strongly recommends that the media should not bear responsibility for unlawful statements made by political candidates in reports or broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements or where the statements constitute clear and direct incitement to violence and the media outlet had an adequate opportunity to prevent their dissemination. This departure from the normal rules of liability is justified by the short duration of campaign periods and the fundamental importance to free and fair elections of unfettered political debate. This limitation of liability does not, however, relieve political parties and other speakers themselves from liability for their statements.

Similarly, IMN stations should bear no responsibility for the content of direct access broadcasts. If they were responsible for the contents of direct access broadcasts, this would put them in the position of being political censors. We are also concerned that preserving media liability for direct access broadcasts would render the IMN stations susceptible to pressure from the Higher Media Council, which only in the past few weeks threatened legal action against media who did not clearly report the government line in the Fallujah conflict.⁸¹ Any such threats in the context of an election campaign

⁸¹ In early November, the Council instructed the media to promote the position of the government in relation to the Falluja conflict, threatening legal action against those media who failed to do so. The directive can be found here: <http://www.cpj.org/news/2004/Iraq12nov04na.html>.

could result in political bias in relation to the carrying of direct access programming, clearly an unacceptable result.

Recommendation:

- The media should not bear responsibility for unlawful statements made by political candidates in reports or broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements or where the statements constitute clear and direct incitement to violence and the media outlet had an adequate opportunity to prevent their dissemination.

III.4.12 Enforcement

Article 13 provides that the NCMC may impose a number of sanctions for violations of the Code. Sanctions must be proportionate to the violation and may include such measures as imposition of a warning, a fine, granting a right of reply and, in case of serious violations, suspension or revocation of a licence (the last two are not applicable to print media operations, as they are not licensed). Broadcast media may also have their equipment seized and their operations suspended or closed.

We commented on the nature of the sanctions that the NCMC may impose in Section III.2.2.1, where we recommended that sanctions such as the seizure of equipment and closure of operations should be imposed through the courts, on application of the NCMC.

The final paragraph of Article 13 provides: “The NCMC may refer any violation of this Code to the IECI to be handled in accordance with its rules and mandate”. While we cannot comment on the mandate of the Independent Electoral Commission of Iraq (IECI), it is very important that the division of roles between the NCMC and the IECI should be very clear. Only one body should be responsible for the supervision of the implementation of the Elections Code and for media compliance with their electoral responsibilities. In any case, given the very broad powers allocated to the NCMC to enforce the Elections Code, it is unclear why it would be necessary to refer any violation to the IECI.

Recommendation:

- Sanctions such as the seizure of equipment and closure of operations should be imposed through the normal courts, on application of the NCMC.
- The law should be very clear on which body is responsible for supervising the implementation of the Elections Code. Given the primary thrust of this Code, as well as its expertise in the area of media, this would presumably be the NCMC.

Draft Programme Code

1. Accuracy, balance and fairness

- 1.1 Broadcasters should report and interpret news and current affairs honestly. They should aim to disclose all known relevant facts and should verify their sources. They should not broadcast material which is inaccurate, misleading or distorted, whether by wrong or improper emphasis or by any other factor.
- 1.2 If a significant inaccurate, misleading or distorted statement is broadcast, it should be corrected promptly, with due prominence and, where appropriate, accompanied by an apology.
- 1.3 Though campaigning journalism has an important role in a democracy, there remains a duty to be balanced and fair in the treatment of news and current affairs and in dealings with members of the public.
- 1.4 For programmes which appear in a regular pattern in the schedule, it is acceptable to achieve proper balance across the series, rather than in every individual programme. For other output, balance achieved over a reasonable period of time is also acceptable. 'Authored' programmes which present an individual's personal view should be clearly identified as such; they must respect factual accuracy and must not be based on false evidence. Similar care is needed with drama-documentary formats which re-create real events and portray actual persons.
- 1.5 Broadcasters themselves must observe due impartiality in controversial matters. They may not 'editorialise' (that is, express partisan views which may be taken as those of the licensee) except in the case of legitimate comment on the provision of the licensed services.
- 1.6 Any individual or organisation which is criticised in a programme in which they have not participated should be given a fair opportunity to reply on-air.
- 1.7 Broadcasters should report fairly the result of any legal action brought against them or any regulatory judgement made against them.

2. Politics and elections

- 2.1 Broadcasters should aim to reflect the diversity of political opinion in society and be the enablers of free and open debate on political matters.
- 2.2 Coverage of the positions and views of political parties should broadly reflect their representation in society, particularly during election campaigns.
- 2.3 Broadcasts by or on behalf of political parties should always be identified as such.
- 2.4 Because of the need to preserve due impartiality, currently-active politicians should not appear as newscasters, interviewers or reporters in news programmes; in other contexts, their party allegiance should be clearly identified.

3. Leaked and restricted material and the protection of sources

- 3.1 The leaking of official and other material is usually done not by the media but to the media – often by politicians themselves or by their servants. It is the proper duty of free media to expose any information they receive to public debate in the public interest. The Code supports that duty.
- 3.2 Broadcasters have a moral obligation to protect confidential sources of information and to respect confidences knowingly and willingly accepted in the course of their work. The Code supports that obligation.
- 3.3 In cases of national emergency, it is proper for the media to limit disclosure in order to avoid danger to life (e.g. of armed-services personnel in wartime) or to public safety. The Code supports that limitation.
- 3.4 Embargoes should be respected unless a breach by other media, or by the originator, has brought the embargoed information clearly into the public domain, when it becomes legitimate to broadcast it and to comment on it.
- 3.5 The laws of copyright and intellectual property should be observed and the right to use quotations under the ‘fair dealing’ convention should not be abused.

4. Identification and attribution of material

- 4.1 It is axiomatic that the audience should never be in any doubt as to the nature of the material being broadcast. There should be a clear distinction of what is fact, what is comment and what is speculation. ‘Spoof’ formats should not mislead in such a way as to cause alarm. Care should be taken over the use of recognised figures such as newscasters in other programme contexts.
- 4.2 Material which has been provided by government, by other official sources, by commercial concerns, by campaigning organisations or by members of the public should always be identified as such; so should simulations and reconstructions of real events. Where library material is used, it should also be identified and not passed off as new or original.
- 4.3 Where broadcasting can play a positive role in the control or alleviation of natural disasters, broadcasters may transmit official announcements, instructions or advice, provided that their nature and origin are made clear.

5. Privacy and the public interest

- 5.1 The broadcasting of information about the private lives or concerns of individuals without their consent is acceptable only if a serious and legitimate public interest outweighs their normal human right to privacy.
- 5.2 ‘In the public interest’ is not the same as ‘of interest to the public’: intrusion is not justified by mere curiosity. Revealing the private affairs of public figures is legitimate where these are relevant to their performance of, or fitness for, their public roles.
- 5.3 Examples of legitimate overriding public interest are: the detection, exposure or prevention of crime or corruption; the protection of public health and safety; or

preventing the public from being misled on an important matter by the public statement or action of an individual or institution.

- 5.4 Recordings of people in public places or of people inside institutions when their presence is anonymous and incidental may be regarded as in the public domain. In other circumstances, permission for the use of such material should be sought from the person featured or, where he or she is not in a position to grant it, from the next-of-kin or an authorised carer. When such material is used to illustrate a specific point, care should be taken not to associate an identifiable individual with a potentially damaging implication (e.g. a medical statistic or an extreme political opinion). The re-use of such material as library footage requires particular care.

6. Grief, bereavement and distress

- 6.1 Approaches to people in extreme distress should be made with sensitivity and discretion; intrusion and voyeurism should be avoided.

7. Harassment, pursuit and covert recording

- 7.1 Broadcasters should not normally seek interviews or information by intimidation, harassment or persistent pursuit, nor should they invade individuals' privacy by deception, eavesdropping or covert technical means.
- 7.2 The use of concealed cameras or microphones to obtain covert recordings is justified only when: exposure of the evidence gathered is in the public interest; it is essential to the credibility and authority of the piece; the material could not have been obtained by any other legitimate means; and the practice has been explicitly approved at the most senior editorial level. Further approval is required before the material is transmitted in its final form. Broadcasters must maintain a log of all requests for covert recording and the responses to them, keep the record for a year after transmission and make it available to the Authority on request.
- 7.3 Contacts should be told when a telephone conversation is being recorded, except when the provisions for covert recording apply.
- 7.4 In set-up situations, such as 'candid camera' formats in television entertainment, where people's behaviour is recorded without their knowledge or without prior warning, their consent should always be sought before the material is transmitted. Its use without their permission can be justified only if it is necessary to make an important point of public interest and must be approved at the highest editorial level.

8. Subterfuge

- 8.1 Broadcasters should use straightforward means to obtain information, normally identifying themselves and their organisation when doing so. The use of a false identity or similar techniques is justified only where disclosure is in the public interest and the material could not have been obtained by any other means.

9. Interviews

- 9.1 Conventional interviews should be arranged, conducted and edited fairly and honestly. Interviewees are entitled to know in advance the format, subject and purpose (though

not the detailed content) of the interview, whether it will be live or recorded, whether it may be edited and whether only part of it may be used – or whether it may not be used at all.

- 9.2 They are also entitled to know in advance the identity and roles of other likely participants in the same item or programme.
- 9.3 If a prospective participant attempts to impose conditions on an interview (e.g. by refusing to appear with other interviewees, by insisting that the contribution is not edited or by demanding a list of questions for vetting in advance), the broadcaster may withdraw the invitation. Any conditions which are accepted may be made clear to the audience.
- 9.4 Anyone has an absolute right to refuse to take part in a programme. If they do so, their refusal should be described to the audience in neutral terms (e.g. 'declined our invitation' or 'was unavailable for comment'). The presenter may deploy the known views of a non-participant in the argument, provided this is done in a fair and balanced way.
- 9.5 The presentation and/or editing of an interview should not distort or misrepresent the views of the interviewee.
- 9.6 The editing of an interview should not give a false impression of dialogue, or of live transmission when it has been recorded.
- 9.7 There should be sound reasons for allowing anonymity to an interviewee; it should not normally be accorded to fugitives from justice.
- 9.8 'Doorstepping' should be resorted to only when a direct approach has failed or might lead to the destruction of evidence or the suppression of information which is in the public interest.

10. Discrimination

- 10.1 Broadcasters should avoid any discriminatory, derogatory or patronising reference to people's race, colour, religion, sex, sexual orientation or preference, age, physical or mental disability or illness.
- 10.2 These characteristics should not be referred to in a pejorative context except where they are directly relevant to the report or add significantly to listeners' understanding of the matter.
- 10.3 In this context, particular care should be taken over references to vulnerable minorities.
- 10.4 While broadcasters are free to report and comment on all matters of public interest, particular care must be taken not to encourage or promote racial or sectarian hatred or discord.

11. Religion

- 11.1 While all public institutions are properly subject to scrutiny, broadcasters should respect the special place which religions are likely to hold in the lives of their adherents. Sensitive and balanced treatment is particularly important in a multi-faith society.

- 11.2 Broadcasters should be aware of the offence which can be caused to believers by casual, gratuitous and expletive references to religious figures.
- 11.3 Religious programmes on non-specialist channels should not proselytise or attempt to influence the audience by preying on their fears; they should not claim for living individuals or groups powers which are incapable of being substantiated; and they should not denigrate the religious beliefs of other people.

12. Strong language

- 12.1 The gratuitous use of strong swear-words and obscene or blasphemous language should be avoided. The broadcasting of such terms is justified only where it is essential to the audience's understanding or to the dramatic development of a story. The context, the time of transmission and the likely audience profile are important considerations, particularly when the audience is likely to include children (see Section 17). No such language should appear in programmes designed specifically for children.
- 12.2 Any use of the most extreme terms (such as the English 'four-letter words') must be approved, where practicable in advance, at the most senior editorial level. This is particularly relevant to acquired programmes originating from other cultures.

13. The involvement of children

- 13.1 Generally, children and young people up to the age of 16 should not be interviewed in the absence of, or without the consent of, a parent or other adult responsible for the child.
- 13.2 Pupils should not be approached or interviewed at school without the permission of the school authorities.
- 13.3 The broadcasting without consent of material about a child's private life cannot be justified solely by the fame, notoriety or position of his or her parents.

14. Victims of sexual crimes

- 14.1 The victims of sexual crimes should not normally be identified, nor material broadcast from which their identity is likely to be inferred.
- 14.2 Children should not be identified when appearing as witnesses in sexual offence cases.
- 14.3 Reports of cases alleging sexual offences against a child may identify an adult concerned but should not identify the child, nor should they include facts which imply a close relationship between an accused adult and a child victim.

15. Portrayal of sexual conduct

- 15.1 When reporting or portraying sexual activity or conduct, broadcasters should be sensitive to the danger of offending public decency or the feelings of the likely audience. Careful attention should be paid to the context and to the time of transmission, particularly when the audience is likely to include children (see Section 17).

- 15.2 Sexual intercourse should not normally be portrayed before the 2100' watershed' (see Section 17). Exceptions may be made in the case of programmes with a serious sex-education purpose and in the case of natural history programmes.

16. Portrayal of violence

- 16.1 The realistic portrayal of violence or the threat of violence, whether in fictional or in factual programmes and news, must be justifiable in its content and intensity as being essential to the integrity of the programme; that is that 'sanitising' or omitting it would undermine the programme's coherence, completeness and honesty.
- 16.2 Violence combined with sexuality should not be portrayed in a manner designed to titillate the audience; explicit detail and the prolonged depiction of violence should also be avoided, particularly where the practices are capable of easy imitation and involve articles or substances readily available to children, such as domestic knives and chemicals. Similar restrictions apply to the portrayal of suicide or attempted suicide. Again, scheduling and the protection of children (see Section 17) are important considerations.

17. Scheduling considerations, 'labelling' and on-air warnings

- 17.1 Material unsuitable for children must not be broadcast on open-access channels at times when large numbers of children may be expected to be viewing or listening. The 'watershed' time after which this expectation may be relaxed is 2100. This provision also applies to trails and promotions for programmes to be transmitted after 2100 which are broadcast earlier.
- 17.2 Where acquired programmes have been given a suitability classification at origin, this should be included in promotions and trails and on transmission. Broadcasters may also attach such classifications to their own originations and to unclassified acquired programmes. In any case, an appropriate warning should be broadcast before or at the beginning of any programme containing material which is likely to be disturbing or offensive to the average viewer or listener, bearing in mind the nature of the broadcasting station, the time of transmission and the likely audience.

18. Crime and anti-social behaviour

- 18.1 Crime and anti-social behaviour, especially where it involves violence, should not be glamorised, or reported or portrayed in a manner likely to encourage imitation or experiment. Particular attention should be paid to the time of transmission and the likely audience.
- 18.2 Detailed information about methods of suicide, hanging, the making of explosive or incendiary devices, other criminal techniques or the illicit use of drugs should not be transmitted in a way which might instruct or encourage such behaviour.
- 18.3 The relatives of people accused or convicted of crime should not normally be identified unless the connection is directly relevant to the matter reported.

19. Kidnapping and hi-jacking

- 19.1 No information should be broadcast which is likely to endanger lives in, or prejudice attempts to deal with, a kidnapping or a hi-jacking. It is acceptable to agree 'news black-outs' with the police and other authorities in such cases.

20. Demonstrations and civil unrest

- 20.1 Broadcasters should be aware that media coverage can influence events and that their presence at the scene may be exploited by elements in the crowd. They should consider withdrawing if their participation appears to be prolonging a dangerous situation or making it worse.
- 20.2 Live coverage of demonstrations and disturbances should be placed in context and incidents which have been deliberately contrived for media coverage should be identified as such.

21. Relations with the police and other authorities

- 21.1 It is no part of the duty of free media to protect criminals or to encourage crime. Nevertheless, practitioners should beware of appearing to act as direct agents of the police or other authorities: in some circumstances this could call into question their editorial independence or put the safety of their staff at risk.
- 21.2 The Code supports the principle that material which has not been transmitted should not be released to the authorities except in response to a court order.
- 21.3 When accompanying the police or other authorities on operations such as raids, practitioners should be aware of the risk that they might themselves be committing offences (such as trespass). If asked to stop recording or to leave the premises, they should normally do so. In such cases, approval for the use of the material recorded must be sought at the most senior editorial level.

22. Payment in criminal cases

- 22.1 Payments should not be made, directly or indirectly, to criminals for information or material related to their crimes; nor should such payments be made to their associates or relatives.
- 22.2 No payment or offer of payment should be made, directly or indirectly, for information or material to any person expected to be a witness in criminal proceedings until the proceedings are concluded.
- 22.3 Payments of this kind may very exceptionally be justified if information which ought to be broadcast in the public interest cannot be obtained by any other means.

23. Advertising, product-placement and 'undue prominence'

- 23.1 Advertisements should be clearly distinguished from editorial and programme matter, normally by a visual device, a 'sting' or a jingle.
- 23.2 Advertising should normally be confined to paid-for advertising time ('commercial breaks'). Product-placement in editorial formats in return for payment or other considerations is not acceptable. Where reference is made within programmes to

commercial products or services, they should not be given greater prominence than is justified by purely editorial considerations.

- 23.3 Advertising material should conform with the principles 'legal, decent, honest and truthful'. In terms of taste, decency and social responsibility it should observe similar criteria to editorial material. It should not disparage identifiable competitors or other products and comparisons should be based on facts which can be substantiated. Testimonials or endorsements should be genuine and relate to the endorser's personal experience. Advertisements directed at children require particular care. These issues are covered in more detail in the Authority's Advertising Code.

24. Competitions

- 24.1 Broadcasters should ensure that, in competition programmes, there is no collusion between broadcasters and contestants which results in an advantage for any contestant over the others.

25. Personal interest and influence

- 25.1 People engaged in broadcasting should not allow personal or family interests to influence them in the conduct of their professional duties.
- 25.2 They should not allow themselves to be influenced by any offer of payment, gift or other advantage, nor by advertising or commercial considerations.

26. Financial journalism

- 26.1 People engaged in broadcasting should not use for their own or their families' profit financial information received in their professional capacity before it is publicly available.
- 26.2 They should not comment on financial holdings in which they or their families have an interest without disclosing that interest to their editor and, where appropriate, to the audience.
- 26.3 They should not buy or sell financial holdings about which they have broadcast recently or on which they are about to comment.

27. Other considerations of content and treatment

- 27.1 Subliminal techniques (the use of images and/or sounds of very short duration, of which the viewer or listener may not be consciously aware) may not be used in any context. Care should also be taken over the use of strobe light effects, which can aggravate certain medical conditions.
- 27.2 If a programme features a hypnotist, he or she may not be shown performing straight to camera. Demonstrations of exorcism or of occult practice are not permitted in factual programming, except where they are the subject of a legitimate investigation. Non-factual programmes containing such phenomena should not be scheduled before the 2100 'watershed' (see Section 17).

- 27.3 Programmes scheduled for deferred transmission or for repeat should be carefully checked before broadcasting, to ensure that any content has not been rendered inappropriate by intervening events.
- 27.4 The principle of 'referring up' applies to the whole of the Code. Where a practitioner has any doubt about the appropriateness of any programme material, he or she must refer the matter to the broadcaster's most senior editorial authority or to a deputy designated for this purpose.

28. Complaints

- 28.1 Licensees should deal promptly, fully and fairly with viewers' and listeners' complaints. Individuals or institutions who believe they have a legitimate grievance against any broadcasting organisation for a breach of the Code are recommended in the first instance to take up the matter through the broadcaster's own complaints procedure. All complaints made directly to a broadcaster, and the broadcaster's responses, must be retained by the licensee for a year and made available to the Authority on request.
- 28.2 A complainant may also lodge a written complaint with the Authority, which will deal with it in the terms of the Broadcasting Act (Breach of Licence Conditions).