An Agenda for Change

The Right to Freedom of Expression

in Nepal

September 2008

FREEDOM FORUM
• Democracy • Human Rights• Media Freedom• Development •
P.O.Box : 24292, Thapathali, Kathmandu, Nepal

FNJ
Federation of Nepali Journalists

ARTICLE 19

6-8 Amwell Street, London EC1R 1UQ, United Kingdom
Tel +44 20 7278 9292, Fax +44 20 7278 7660
info@article19.org
www.article19.org

Freedom Forum
Post Box No. 24292, Thapathali, Kathmandu, Nepal
Tel +977 1 4102030, Fax +977 1 4102022
freedomforum@enet.com.np
www.freedomforum.org.np

Federation of Nepali Journalists (FNJ)
Media Village, Kathmandu, Nepal
Tel +977 1 4112763, +977 (0)16204755,
hotline +977 1 4112723, Fax +977 1 4490085
fnjnepal@mail.com.np
www.fnjnepal.org

Acknowledgements

The Recommendations in the text were developed jointly by the Members of the Agenda for Change Stakeholder Group (listed in Annex A). The rest of this document was written by Toby Mendel, Senior Director for Law, ARTICLE 19, with the help of Santosh Sigdel, Nepal Representative, ARTICLE 19, and Tanka Raj Aryal, Consultant, ARTICLE 19. Comments were provided by Freedom Forum and by the Federation of Nepali Journalists.

ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees freedom of expression. It has been involved in the Agenda for Change process from the beginning and has provided expertise and documentation to support the process.

The Federation of Nepali Journalists (FNJ) is the representative umbrella association of the media community in Nepal. Its 7500 members operate across the length and breadth of the country and belong to every sphere of the modern media, print, broadcast and Internet.

Freedom Forum is a not-for-profit, non-governmental organisation founded in February 2005 promoting democracy and human rights, including freedom of expression.

Both FNJ and Freedom Forum have been involved in the Agenda for Change process from the beginning, providing support in different ways, including by helping to identify participants, developing the agenda for meetings and participating in meetings.

Funding for the Agenda for Change process was provided in full by the UK Foreign and Commonwealth Office (FCO). The views expressed in this publication do not represent the views of the FCO.

This document is translated into Nepali language by Advocate Bhola Nath Dhungana.

© ARTICLE 19
Global Campaign for Free Expression
ISBN 978-1-906586-02-7

Contents

Acknowledgements
1. Introduction 7
2. International Guarantees 9
2.1 Freedom of Expression as a Human Right 9
2.2 Key Aspects of Freedom of Expression 9
2.3 Permissible Restrictions on Freedom of Expression 11
2.4 Regulation of the Media: General Principles 12
2.4.1 The Importance of Media Freedom 12
2.4.2 Pluralism 14
2.4.3 Independence of Regulatory Bodies 15
2.5 The Right to Information 16
3. Recommendations and Analysis 19
3.1 Constitutional Issues 19
3.1.1 General Guarantees 19
3.1.2 Restrictions 20
3.2 Content Restrictions 21
3.2.1 Defamation 21
3.2.2 National Security 24
3.2.3 States of Emergency 25
3.2.4 Hate Speech 25
3.2.5 Privacy 26
3.2.6 Blasphemy 26
3.2.7 Criticism of the Judiciary 27
3.2.8 Criticism of Parliament 28
3.2.9 Obscenity 29
3.2.10 Informal Harassment 29

3.3 Media Regulation 30

3.3.1 Regulation of Media Workers 30

3.3.2 Regulation of the Print Media 32

3.3.3 Regulation of Broadcasting 34

3.3.4 Public Media 36

3.3.5 Subsidies and Tax 37

3.3.6 Ownership Rules 38

3.4 The Right to Information 39

3.4.1 General Principles 39

3.4.2 Implementation 40

3.4.3 The Commission 41

3.5 The Internet 42

3.5.1 Access 42

3.5.2 General Content Restrictions 42

3.5.3 Regulation 43

3.6 Film 43

3.7 Advertising 44

4. Conclusion 45

Annex 46

1. Introduction

This document is the culmination of a year of intensive activities conducted jointly by ARTICLE 19, Freedom Forum and the Federation of Nepali Journalists, which together make up the Agenda for Change process. The core of the process was a series of three meetings bringing together a Stakeholder Group representing different sectors of Nepali society, including the media, officials, representatives of political parties, civil society, representatives of minority groups and women, members of parliament and legal experts. The members of the Stakeholder Group are listed in Annex A, along with their expertise and main institutional or sectoral affiliations.

The meetings provided an opportunity for in-depth consideration of all issues of importance relating to freedom of expression in Nepal. The first meeting started with an overview of the situation in Nepal and under international law regarding freedom of expression, with a view to providing background and context. The meeting then addressed constitutional protections, defamation, national security and states of emergency, and other content restrictions, including in the areas of hate speech, privacy, blasphemy, criticism of the judiciary and parliament, and obscenity. Each topic was tackled one at a time, with presentations on the existing situation in Nepal and international standards followed by discussions, both in plenary and in smaller working groups, leading to the adoption of recommendations.

The second meeting focused primarily on media regulation and the right to information. The first topic addressed was general principles on media freedom, including pluralism of the media, and independence of the media and regulatory bodies from political and other vested interests. The meeting then went on to address a number of different media sectors, including media workers, print media, broadcasters and public service broadcasting. A number of issues relating to the right to information were also canvassed, including the general scope of the right, implementation and the status and independence of the information commission.

The focus of the third meeting was on Internet and film regulation, commercial issues and issues arising. Specific topics under the Internet included access to this new medium, regulation and the issue of applying content restrictions to the Internet. A range of commercial issues relating to the media, such as advertising, subsidies and concentration of ownership rules were addressed, along with film regulation. As in previous sessions, presentations on Nepali practice and international standards were followed by small group and plenary discussions leading to agreement on recommendations. Detailed background papers on the topics covered in the three meetings were produced and these are available in both English and Nepali.

A final set of recommendations has been agreed by the Stakeholder Group and these provide the main backbone for the

substantive part of this document. Together, the recommendations are a blueprint for what the Stakeholder Group would like to see as a global framework for freedom of expression in Nepal. Put differently, implementation of the recommendations would create an environment of full respect for freedom of expression. Implementation of all of the recommendations at once may not be possible; however, the gradual process of implementation of these recommendations is essential. At the same time, work has already started on implementation of some, and the Stakeholder Group is committed to working with the concerned agencies to promote implementation of as many of the recommendations as possible.

This Report is organised around the recommendations adopted by the Stakeholder Group but it also provides background as to the law and practice in Nepal, as well as the international standards, which inform the recommendation. It is thus intended to serve as a comprehensive reference guide on freedom of expression issues in Nepal.

2. International Guarantees

2.1 Freedom of Expression as a Human Right

The right to freedom of expression is a fundamental human right; fundamental both in the sense of its central importance to human life and dignity but also as an essential underpinning of all human rights, including the right to participate in political life (democracy).

The right to freedom of expression is recognised in all of the main international and regional human rights treaties. It was proclaimed as a right of the highest importance in the **Universal Declaration of Human Rights (UDHR)**,[1] adopted unanimously by the United Nations General Assembly in 1948, just three years after the United Nations was first created. Article 19 of the UDHR states:

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

This right has also been enshrined in the **International Covenant on Civil and Political Rights (ICCPR)**,[2] which Nepal committed itself to respect through accession on 14 May 1991. All three regional human rights treaties – in Africa, Europe and the Americas – also protect this basic human right. Guarantees of freedom of expression are found in the vast majority of national constitutions, including Nepal's Interim Constitution [Article 12(3)(a)].

Section 9(1) of the Treaty Act 1990 of Nepal accords international treaties to which Nepal has become a party and which has been approved by the parliament legal status as domestic law. In case of a conflict between the provisions of a domestic law and a treaty, the treaty provisions prevail.

2.2 Key Aspects of Freedom of Expression

As its formulation in Articles 19 of the UDHR and ICCPR shows, the right to freedom of expression is very broad in scope. It applies, in essence, to any situation in which a person communicates with another. The right to freedom of expression belongs to everyone; it is enjoyed regardless of a person's level of education, his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. One important consequence of this is that the State should recognise freedom of expression not only in respect of its own citizens, but in respect of anyone falling under its jurisdiction, including foreign and stateless persons.

---

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

2 Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

The right to "impart information and ideas" is the most obvious aspect of freedom of expression. It is the right to tell others what one thinks or knows, whether in a private meeting or through a means of mass communication. But freedom of expression serves a larger purpose: to enable everyone not just to contribute but also to have access to as wide a range of information and the viewpoints of others as possible. Article 19 thus provides that freedom of expression also includes the right to seek and to receive information and ideas, for example by obtaining and reading newspapers, listening to broadcasts, surfing the Internet, participating in public debates as a listener and undertaking journalistic or academic research. It is increasingly being recognised that it also encompasses the 'right to information', in the sense of a right to access records held by public authorities.

The right to freedom of expression applies to any kind of fact or opinion which can be communicated, regardless of its content or purpose. The UN Human Rights Committee (HRC), the body that oversees implementation of the ICCPR, has stressed this point:

> *Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others … of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression.*[3]

The right to freedom of expression extends to controversial, false or even shocking material; the mere fact that an idea is disliked or thought to be incorrect cannot justify preventing a person from expressing it. As legal philosophers have frequently pointed out, legal protection only for accepted information and ideas would be a hollow gesture. It is precisely persons who have something to say that others disagree with that require protection. The European Court of Human Rights has stated that it "matters little that [an] opinion is a minority one and may appear to be devoid of merit since … it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."[4] The Court has also frequently stressed:

> Freedom of expression … is applicable not only to 'information and ideas' that are favourably received or regarded as inoffensive 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 broad mindedness without which there is no 'democratic society'.[5]

As the words "regardless of frontiers" in both the UDHR and ICCPR make clear, the right to freedom of expression is not limited by national boundaries. States must allow their own citizens and foreign nationals to seek, receive and impart information to and from other countries, for example by importing foreign publications, exporting domestic publications or working for foreign media.

---

3 Ballantyne and Davidson v. Canada, Communication No. 359/1989, and McIntyre v. Canada, 5 May 1993, Communication No. 385/1989, Annex, para. 11.3.

4 Hertel v. Switzerland, 25 August 1998, Application No. 25181/94, para. 50.

5 Handyside v. the United Kingdom, 7 December 1976, Application No. 5493/72, para. 49.

An important part of freedom of expression is the freedom to choose the means through which one expresses oneself. As the European Court of Human Rights has frequently stated: "[I]t must be remembered that [freedom of expression] protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."[6] Therefore, if a State prohibits a particular form of expression, such as wearing a certain type of clothing, burning a flag, speaking a particular language or using certain words, the State is restricting freedom of expression, even if the same information or idea could also be communicated in another form permitted by law.

Finally, and importantly, the right to freedom of expression has not only 'negative' implications, but also 'positive' ones; that is to say, States are not just required to refrain from interfering in the right but must also take active steps to promote the free flow of information in society. This is made clear by Article 2 of the ICCPR, which provides that all States Parties to the Covenant undertake to "respect and to ensure to all individuals … the rights recognized in the present Covenant" (emphasis added).

Examples of proactive measures which States should take are preventing the monopolisation of media outlets by the government or private entrepreneurs; proactively disseminating information; ensuring that minority groups are able to make themselves heard through the media; and, in transitional countries, making it a priority to abolish or amend laws from previous regimes which limit freedom of expression.

6 See, for example, Karatas v. Turkey, 8 July 1999, Application No. 23168/94, para. 49.

2.3 Permissible Restrictions on Freedom of Expression

In most cases, the exercise of the right to freedom of expression is harmless but, at the same time, 'seeking, receiving and imparting information or ideas' also encompasses activities which few societies could tolerate, such as incitement to murder, the placement of unauthorised graffiti on public walls or the sale of pornography to children. International law therefore recognises that the right to freedom of expression is not absolute.

Because interference with freedom of expression is a serious matter, restrictions are legitimate only if they meet certain strict conditions are met. Freedom of expression should be the rule, and limitations the exception; limitations should always leave the essence of the right intact. Article 19(3) of the International Covenant on Civil and Political Rights sets out the test for assessing the legitimacy of restrictions on freedom of expression:

> *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.*

This test, which is found in a similar form in all the major human rights instruments, includes three parts: first, the interference must be in accordance with a law; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate in international law; and third, the restriction must be **necessary** for the protection or promotion of the legitimate aim. Any law or measure which restricts freedom of expression, whether directly or indirectly, must pass all three parts of the test.

The first condition means, first and foremost, that an interference with the right to freedom of expression cannot be merely the result of the whim of a public official. There must be an enacted law or regulation which the official is applying. The condition of 'provided by law' requires more, however, than the mere existence of a piece of legislation. The legislation must also meet certain standards of clarity and precision, enabling citizens to foresee the consequences of their conduct. Vaguely worded edicts, whose scope of application is unclear, will not meet this standard and are thus illegitimate as restrictions on freedom of expression. For instance, a prohibition on "sowing discord in society" or "painting a false image of the State" would fail the test on account of vagueness.

The second requirement for restrictions on freedom of expression is that they must serve a legitimate aim. This requirement is not open-ended; the list of legitimate aims provided in Article 19(3) of the ICCPR is exclusive and governments may not add to these. It includes only the following legitimate aims: respect for the rights and reputations of others, and protection of national security, public order (ordre public), public health or morals. Thus, a desire to shield a government official from criticism, for example, can never justify limitations on free speech.

The final part of the test holds that even if a restriction is in accordance with an acceptably clear law and if it is in the service of a legitimate aim, it will still breach the right to freedom of expression unless it is truly necessary for the protection of that legitimate aim. This part of the test may seem self-evident: if a restriction on a right is not needed, why impose it? Nevertheless, in the great majority of cases where international human rights courts have ruled domestic laws to be impermissible restrictions on the right to freedom of expression, it was because the legislation in question was not deemed to be **necessary**. An important reason for this is that international courts read the word 'necessary' as imposing several requirements on any law or practice which abridges freedom of expression.

In the first place, to justify a measure which interferes with free speech, a government must be acting in response to a pressing social need, not merely out of convenience.

Second, if there exists an alternative measure which would accomplish the same goal in a way is less intrusive to the right to free expression, the chosen measure is not in fact 'necessary'. For example, shutting down a newspaper for defamation is excessive; a retraction, or perhaps a combination of a retraction and a warning or a modest fine, would adequately protect the defamed person's reputation.

Third, the measure must impair the right as little as possible and, in particular, not restrict speech in a broad or untargeted way, or go beyond the zone of harmful speech and rule out legitimate speech. In protecting national security, for example, it is not acceptable to ban all discussion about a country's military forces. Courts have recognised that there

may be practical limits to how precise a legal measure can be. But subject only to such practical limits, restrictions must not be overbroad.

Fourth, the impact of restrictions must be proportionate, meaning that the harm to the public interest caused by a restriction must not outweigh its benefits to the interest it seeks to protect. For example, a ban on reporting the discovery of a new infectious disease may serve a legitimate purpose – preventing panic amongst the public and hence preserving public order – but it is probably not 'necessary' because the disadvantages of such a ban for public health are more serious.

Finally, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied. A restriction in favour of national security which is justifiable in time of war, for example, may not be legitimate in peacetime.

2.4 Regulation of the Media: General Principles

2.4.1 The Importance of Media Freedom

It is recognised everywhere that the media play a vital role in protecting democracy and its institutions. The media provides a platform for public debate and for resolving public issues. They are also in the best position to investigate and report on issues of public importance and interest, particularly relating to the political process, the conduct of public officials, the positions taken by government with respect to international issues, corruption, mismanagement or dishonesty in government, and human rights issues, among other things. Indeed, it is fair to say that the vast majority of individuals gain almost all of their knowledge about matters outside of their own day-to-day lives from the media.

It is, therefore, of paramount importance that the freedom of expression of the media be ensured and protected. Media actors, such as journalists and editors, should be able to exercise their own right to freedom of expression. This is an essential precondition for the realisation of the right of every member of society to seek and receive information from a wide range of sources, another aspect of the right to freedom of expression.

The importance of freedom of the media has been stressed by international courts. The UN Human Rights Committee (HRC) has stated:

> *[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.*[7]

The European Court of Human Rights has noted that the media as a whole merit special protection, in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] 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'."[8]

---

7 General Comment 25, issued 12 July 1996.

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

Regulation of the media by the government presents special problems. On the one hand, it is the government's duty to ensure that citizens have access to diverse and reliable sources of information on topics of interest to them. A certain amount of regulation of the media, in particular the broadcast media, is necessary to accomplish this goal. On the other hand, the power of the media to influence public opinion – for example by reporting critically on government policies and exposing corruption, dishonesty and mismanagement – makes them an attractive target for illegitimate government control.

2.4.2 Pluralism

The concept of pluralism is fundamental to both democracy and to the protection of media freedom. A society where only a privileged few can effectively exercise their right to freedom of expression through the media is not a free society. Such a situation breaches not only the rights of those who are denied the ability to express themselves through the media but also the right of society as a whole to be well-informed and to receive information from a variety of sources.

For these reasons, international human rights law not only strongly promotes the idea of pluralism in relation to the right to freedom of expression but also requires States to take positive steps to safeguard it. In an often-repeated statement, the European Court of Human Rights has stated:

> *The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.*[9]

The protection of pluralism provides one of the main justifications for media regulation, particularly in relationship to the broadcast media. It is internationally accepted that States should regulate the airwaves to provide for a plurality of voices. State monopolies are incompatible with the right of the public to receive information from a variety of sources. Simply allowing private broadcasters, however, is not enough. States should take steps to ensure that broadcasting licences are awarded to operators who collectively present a wide and balanced range of views and information which serves the needs of the population as a whole.

With regard to the print media, it is internationally accepted that the best way to encourage pluralism is by abolishing legal and administrative obstacles to the establishment of newspapers and magazines, and by enabling free and genuine competition between them. In contrast to broadcasting, the print media do not rely on a limited resource (the broadcasting spectrum). It is therefore not necessary to allocate licences and decide who has the right to publish; anyone who wishes to should be permitted to start their own publication.

Regulatory measures may not be sufficient to ensure pluralism in the media and, where

9 Informationsverein Lentia and others v. Austria, 28 October 1993, Application No. 13914/88, para. 38.

this is the case, States should also consider providing support measures. These may include general measures aimed at the media sector as a whole, such as the abolition of taxes on print paper and other materials necessary for operating media outlets, as well as direct support for certain types of media outlets, for example those that serve small or minority sections of the audience. If direct support measures are provided, States should take care to ensure that they are allocated on the basis of objective and non-partisan criteria, within a framework of transparent procedures and subject to independent control.

2.4.3 Independence of Regulatory Bodies

The task of regulating some types of media necessitates the establishment of special oversight bodies which can take decisions on a regular basis and develop special expertise in their fields. The media regulatory bodies found in many democracies include general broadcast regulators responsible for awarding licences to private broadcasters; governing boards of public media; and film boards tasked with reviewing new films and making recommendations on their suitability for minors.

Each of these bodies takes important decisions which may impact on the kind of information that reaches the public or the ability of the public to use a particular medium. If such decisions are taken by the government, there is an inevitable risk that the government and its allies will end up as the greatest beneficiaries. In many countries where the government awards broadcasting licences, for example, the majority of stations are controlled by businesses close to the government or by family members of senior officials, and opposition parties have little access to the broadcast media and thus to potential voters.

Even if a government approaches the task of regulating the media in good faith, however, the very fact that important decisions are made by the government can have the effect of restricting freedom of expression. For example, a television station whose broadcasting licence is up for renewal may refrain from criticising the authorities, out of fear that the renewal will not be granted, even if this fear is not justified. If the government directly regulates the media, self-censorship is likely to be the result.

By the same token, control of a media regulatory body by an interest group other than the government can be equally harmful to freedom of expression and pluralism. Major corporations, family clans or other groups may try to gain control of such bodies in order to strengthen their overall control of the media.

The logical solution to this problem, which has been adopted in most democracies, is to allocate the responsibility for regulating the media to administrative bodies which are independent of government and other interests, and shielded from interference. The three special mandates for protecting freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – adopt a Joint Declaration each year setting out standards relating to important freedom of expression issues. In their 2003 Declaration, they stated:

> *On the Regulation of the Media*
>
> *All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.*[10]

2.5 The Right to Information

The right to freedom of expression, which includes the right to seek and receive, as well as to impart information and ideas, encompasses a right to access information held by public bodies. As the special mandates stated in their 2004 Joint Declaration:

> *The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.*[11]

The UN Special Rapporteur on Freedom of Opinion and Expression provided extensive commentary on the right to information in his 2000 Annual Report to the UN Human Rights Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development. He also set out in some detail the content of the right as follows:

> *On that basis, the Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:*

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect

---

10 Joint Declaration of 18 December 2003. Available at: http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf.

11 Adopted on 6 December 2004. Available at: http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2004.pdf.

Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[12]

12 Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, paras. 42 and 44.

3. Recommendations and Analysis

3.1 Constitutional Issues

The Interim Constitution 2007 was promulgated in January 2007 following on from the successful peoples' movement of 2006. Part 3 of the Interim Constitution guarantees fundamental rights, including the right to freedom of expression. Article 12(3)(a) guarantees every citizen the right to freedom of opinion and expression.

In addition to the general guarantee, Article 15 provides special protections for the media. Censorship of publications, broadcasters and printed news is not permitted. Both electronic media – defined to include radio, television, online media or any other type of digital or communication media – and print media are protected against closure, seizure or having their registration cancelled for their content. Communication media shall not be obstructed except in accordance with the law.

Article 27 of the Interim Constitution guarantees the right to information. It provides that every citizen has the right to seek and receive information of a personal nature or relating to matters of public importance, provided that no one shall be required to provide information which has been declared secret by law.

3.1.1 General Guarantees

Recommendation 1: The constitutional guarantee of freedom of expression should apply to everyone.

As noted, Article 12(3)(a) of the Interim Constitution guarantees every citizen the right to freedom of opinion and expression. It is well established under international law, however, that the right to freedom of expression applies to everyone. This means that States are under an obligation to respect the freedom of expression rights of everyone under their jurisdiction. It may be noted that this does not pose any risk to the State given that international law, and the Interim Constitution, allow for restrictions on rights to protect overriding interests, such as public order and national security.

Recommendation 2: The right to freedom of expression should include the right to seek, receive and impart information and ideas of all kinds, and through any media.

The Interim Constitution of Nepal simply sets out the right to freedom of expression as such, whereas Article 19(2) of the ICCPR elaborates on the meaning of the right, clarifying that it includes the right to "seek, receive and impart" information and ideas, that this applies "regardless of frontiers" and that it applies to any form of communication. While it is certainly open to courts to interpret the constitutional guarantee to include the various aspects elaborated under international law, they might also interpret it more narrowly. It is, therefore, important to clarify in the text of the constitution, as far as possible, the extent of the right.

3.1.2 Restrictions

Recommendation 3: The grounds for restricting freedom of expression should be limited to those interests recognised under international law – namely protection of the rights and reputations of others, national security, public order, and public health and morals. Harmonious relations among peoples of various castes, tribes, religion and communities should be protected only inasmuch as this is necessary to maintain public order.

The grounds upon which restrictions on right to freedom of expression are permitted by the constitution and under international law are a very important aspect of the overall scope of the right. The Interim Constitution recognises the following grounds for restricting freedom of expression:

- sovereignty and integrity of Nepal;
- harmonious relations subsisting among the peoples of various castes, tribes, religions or communities;
- defamation;
- contempt of court;
- incitement to an offence; and
- acts contrary to public decency or morality.

In general, these restrictions are also found under international law, albeit in a slightly different list. The reference to harmonious relations, however, is problematical from the perspective of freedom of expression. While promoting harmonious relations is an important goal, much legitimate expression may undermine such relations. This might be the case, for example, with a frank discussion about the problem of caste or community discrimination. Instead, only incitement to hatred, discrimination or violence against groups should be prohibited, in accordance with Article 20(2) of the ICCPR.

Furthermore, three of the grounds under the Interim Constitution – defamation, contempt of court and incitement to an offence – are not actually interests but are, rather, types of laws. The interest protected by defamation laws, for example, is reputation, while laws on contempt of court and incitement to an offence are designed to protect public order and, to some extent, the rights of others. The danger in listing types of laws is that it suggests that such laws are themselves legitimate, whereas they should in fact be subjected to a full assessment of whether or not they meet the constitutional standard for restrictions on freedom of expression. In other words, the present formulation may lead courts to approve any defamation, contempt of court or incitement to an offence law, whereas such laws should be subject to close scrutiny to ensure that they are in fact "reasonable".

Recommendation 4: Restrictions on the right to freedom of expression should be permitted only where they are necessary to protect one of the above-mentioned interests (rather than the lower standard of reasonableness that currently applies).

Under the Interim Constitution, restrictions are only required to be 'reasonable' to prevent speech which 'may undermine', 'may jeopardize' or 'may be contrary to' various interests This is a much lower standard than that imposed by international law. Under international law, a mere risk of harm to the protected interest is not sufficient. Instead, international law requires restrictions to be necessary. Necessity encompasses not only reasonableness, but also sufficiency and

proportionality, and the notions of least restrictive means available and an absence of overbreadth. International courts, in a number of decisions, have made it clear that the restriction must respond to a "pressing social need", not simply a vague risk.

3.2 Content Restrictions

3.2.1 Defamation

Recommendation 5: There should be no criminal defamation provisions.

The Nepali Defamation Act 1959, enacted on 29 June 1959, provided for the first time for a specific regime for the regulation of defamation which, prior to that, had been dealt with under the Country Code. Although the Act does not specifically distinguish between civil and criminal aspects of defamation, Section 5 provides for a fine up to Rs. 50,000 (approximately USD850) or imprisonment for up to 2 years or both for dishonouring someone, or for printing or writing something deliberately, or with adequate reasons to believe it is not true, to dishonour someone. Section 12 of the Act provides for compensation, taking into account the public reputation and prestige of the plaintiff, where a claim of defamation is upheld.

Imprisonment is clearly a criminal sanction and hence defamation has a criminal nature in Nepal. However, the practice shows that imprisonment is very rarely requested by plaintiffs in defamation cases. Defamation cases are not categorized under the State Cases Act, so that the State does not play a role in the process of bringing defamation cases. Where the plaintiff is successful in winning his or her defamation case, the defendant must also pay for legal costs.

A growing number of countries around the world have done away with, or are in the process of doing away with, criminal defamation laws, replacing them with civil defamation regimes. Criminal defamation is offensive to the guarantee of freedom of expression because civil defamation laws provide adequate protection for reputation, so that criminal laws cannot be justified.

Recommendation 6: Public bodies should not be able to bring defamation cases and public officials should be required to tolerate a greater level of criticism than ordinary citizens.

Section 4(2) of the Defamation Act 1959 states that criticism of public officials relating to the performance of their work shall not be considered as defamation. Similarly, Section 4(3) states that comments about the attitude and behaviour of public officials regarding their official responsibilities shall not be considered defamatory. The Act does not specifically address the issue of the responsibility of public officials to tolerate greater criticism, but these provisions are broadly in line with that idea.

The Defamation Act is not clear on the issue of whether or not public bodies are entitled to bring defamation cases. Under international standards, public bodies should not be allowed to sue for defamation under any circumstances because they do not have a "reputation" as such of their own which they are entitled to protect. As abstract entities without a profit motive, they lack an emotional or financial interest in preventing damage to their good name. Moreover, it is improper for government to spend public money on defamation suits to defend its own reputation.

Public officials occupy an intermediary position under international law. They are subject to a wider margin of criticism than ordinary members of the public but, in contrast to public bodies, they are entitled to sue when defamed in their private capacity. In general, the more senior the public servant, the more criticism he or she may be expected to tolerate, with politicians at the top of the scale.

Recommendation 7: The following rules should apply to liability for defamatory statements:

- No one should be liable in defamation for statements which are true or which are opinions.
- Certain types of statements – such as statements made in court or in Parliament – should never attract liability under defamation law. Statements made in the performance of a legal, moral or social duty or interest should be exempt from liability unless they can be shown to have been made with malice.
- No defamation liability should ensue for reporting statements by third parties where this is in the overall public interest and those statements have not been endorsed.
- Actors who simply play a role in the distribution of defamatory materials, such as the post office, newspaper vendors and bookstores, should be protected against defamation liability.
- No defamation liability should ensue where an incorrect statement is disseminated due to an honest mistake. Other remedies, such as a complaint to the Press Council, may still apply.

The Defamation Act 1959 does not provide for absolute protection for opinions and true statements. The law of defamation should serve to protect individuals against unwarranted attacks on their reputation, rather than to protect their honour regardless of whether their good reputation is deserved. It is thus accepted that only false statements should attract liability in defamation. Opinions are by definition not statements of fact which can be proved to be true or false. Whether an opinion is reasonable is a subjective question, which should not serve to attract liability in defamation. In other words, there may be different opinions about individuals, and one should not be liable for expressing one's opinion, even if others disagree with it.

Section 47 of Evidence Act 1974 states that witnesses in legal cases are protected against legal liability, including in defamation, for statements they make, unless the statement is false.

In a similar vein, Article 56 of the 2007 Interim Constitution provides that parliamentarians are protected against any legal charges, including defamation, for statements made in the parliament, while official parliamentary reports are similarly protected. Article 77 of the Interim Constitution provides very similar protection to Constituent Assembly Members.

It is widely recognised that there are certain forums in which the ability to speak freely is so vital that statements made there should never lead to liability for defamation. International courts have held that an absolute privilege should apply, for example, to statements made during judicial proceedings, statements before elected bodies and fair and accurate reports on such statements. The limitation found under Nepali law for

witnesses, namely that the statement must be true, undermines this principle. Courts have special rules for dealing with intentionally false statements, known as perjury, but non-intentional mistakes should not attract defamation liability.

Certain other types of statements should enjoy a qualified privilege; that is, they should be exempt from liability unless they can be shown to have been made with malice. This category should include statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police. In such cases, the public interest in the statements being made is deemed to outweigh any private reputation interest in suppressing the statements.

The Defamation Act does not address the issue of reporting on statements made by others. It is a duty of journalists to report statements made by others in the interest of bringing them to the attention of the public. Journalists should not be held liable for reporting or reproducing the statements of others, so long as these statements have news value and the journalist refrains from endorsing them.

Section 6 of the Defamation Act provides for fines of up to Rs. 100 and/or imprisonment for up to six months for selling or displaying for sale printed materials with knowledge that they contain news dishonouring someone. Instead, anyone simply involved in disseminating defamatory materials without knowledge of their content should be protected against liability.

Section 9 of the Defamation Act protects individuals against defamation liability for statements made in good faith for the public benefit. Under international law, such statements, as well as statements which were made with reasonable care but which still contain factual errors, are protected.

Recommendation 8: The following rules should apply to the imposition of sanctions for statements held to be defamatory:

- Courts should apply the lightest remedy that redresses the harm done by a defamatory statement, taking into account any other remedies that might have been applied, for example by the Press Council.
- Legal and natural persons who suffer actual financial loss from a defamatory statement should have a right to receive compensation for that.
- In cases of intentional defamation, the person affected should be able to recover damages, for which minimum and maximum levels should be set.

The Defamation Act 1959 provides right for filing of defamation cases if any one feels that statements which have been disseminated are defamatory. As noted above, legal defamation cases are relatively rare in Nepal although a number of cases involving the print media have been decided by the trial and appellate courts. Where such cases are brought, however, the rules regarding remedies are not clear. Potential remedies include imprisonment, although this is rarely demanded. Research suggests that newspapers lose the most of the defamation cases against them because they do not respond in a proper and timely fashion to the court.

One of the remedies available to the Press Council, upon deciding that a newspaper is in breach of the rules, is to require the newspaper to publish a statement by the

aggrieved party or to make an apology to the aggrieved party. The Code of Conduct also requires newspapers to correct any error or mistake as soon as possible, and to give proper place to any correction or reply which is accompanied by appropriate evidence, publishing or broadcasting the same in clear language upon receiving information about any error or mistake in a publication or broadcast.

3.2.2 National Security

Recommendation 9: A clear set of legal rules on restrictions on freedom of expression should be adopted to give effect to the following principles and these rules should only be applied in accordance with the three-part test for restrictions on freedom of expression prescribed by international law:

- No one should be punished for an expression on grounds of national security unless the expression is intended and likely to incite imminent violence, and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.
- When restricting freedom of expression on grounds of national security, the authorities should be transparent and demonstrate clearly what threat the restriction will remove.

National sovereignty and integrity is recognised under the Interim Constitution as a ground for restricting freedom of expression, although any such restrictions must be ‘reasonable’.

Section 14(b) of the Press and Publication Act 1991 provides that nothing may be published that undermines national sovereignty and integrity. Similarly, Section 14(c) prohibits the publication of materials that affect national peace and security, while Section 16(1)(b) empowers the governments to issue an order prohibiting the importation of foreign publications which affect national peace and security.

Section 7 of the National Broadcasting Act provides that, taking into account the national interest, the government may, by notification published in the Nepal Gazette, prevent any programme pertaining to any particular subject, event or area from being broadcast by a broadcasting institution, for a period not exceeding six months. Although this provision does not refer explicitly to national security, it has been invoked in that context in the past.

The problem with these provisions is that they are open to abuse. The potential for this is clear in relation to Section 7 of the National Broadcasting Act, which does not require the government to establish any particular link between the banned statements and the risk of harm to national security. Similarly, only a very weak link is required under the Press and Publication Act 1991 provisions.

Under international law, restrictions on freedom of expression must be necessary. In the context of national security, international courts have interpreted this to mean that there must be a close and causal relationship between the expression being restricted and the risk of harm to national security. It must be established that the specific expression in question poses a risk of harm, as opposed to merely reporting on risks that already exist. Blanket bans for up to six months, as envisaged in the Nepali legislation, by definition fail to meet this standard. To avoid vague appeals to national security as a

ground for restricting expression, there must be an immediate likelihood of violence, since otherwise an unacceptably wide range of expression might be prohibited. Furthermore, no individual should be punished unless they acted with intent to cause harm. Fundamental overhaul of the Nepali rules on this issue is required to bring them into line with these standards.

3.2.3 States of Emergency

Recommendation 10: The right to freedom of expression should not automatically be limited when an emergency is declared. Derogating from the right to freedom of expression during emergencies should be an exceptional measure to be applied only when strictly justified by the particular circumstances.

Article 143 of the Interim Constitution provides for the declaration of a state of emergency by the government or council of ministers in case of a grave crisis affecting the sovereignty or integrity of the country. Such a declaration must be laid before the legislature within a month, and the legislature may approve it, by a two-thirds majority, for a duration of up to three months which may, by a similar vote, be extended for one more period of three months. Pursuant to Article 143(7), rights may be suspended, apparently completely, during an emergency.

International law does recognise that during emergencies States may need to derogate from human rights for the greater common good. Article 4 of the ICCPR provides for emergency derogations from rights but places a number of conditions, both substantive and procedural, on such derogations, as follows:

- derogations may only be imposed where the emergency threatens the life of the nation;
- derogations must be officially proclaimed;
- derogations may only limit rights to the extent strictly required and may never lead to discrimination;
- no derogation is possible from certain key rights;
- States imposing derogations must inform other States Parties of the rights to be limited and the reasons for such limitation; and
- derogating States must inform other States Parties of the termination of any derogations.

The Nepalese rules fail to meet these standards in several respects. They do not require the crisis to threaten the life of the nation. Importantly, the Constitution does not require derogations from rights to be limited "to the extent strictly required by the exigencies of the situation" or to be imposed in a non-discriminatory manner. Indeed, it would appear that the Constitution allows for rights to be suspended altogether. This limitation is an extremely important part of the system for derogation recognised under international law and, furthermore, is obvious common sense. Emergencies may require some limitations on rights but they rarely, if ever, require rights to be suspended altogether.

3.2.4 Hate Speech

Recommendation 11: Media pluralism, in terms of ownership, workforce and content, is key to any long-term solution to the problems of racism and intolerance. Media owners should take steps to ensure diversity in their workforce and the authorities should take steps to promote a

pluralistic media environment. At the same time, intentional incitement to discrimination, hatred or violence based on nationality, race or religion should be prohibited.

The Interim Constitution provides for restrictions on anything which may jeopardise the harmonious relations subsisting among the peoples of various castes, tribes, religion or communities (Article 12(3)(a)). Implementing this, Section 14(d) of the Press and Publication Act 1991 prohibits the publication of anything which creates discord among people of various castes, religion, class, area and community or which promotes communal animosity. Section 15 of the National Broadcasting Act 1993 prohibits the broadcasting of advertisements or materials misinterpreting, disregarding, insulting and devaluing any tribe, language, religion or culture.

As noted above, these prohibitions go beyond what is permitted under international law, which calls for the banning only of intentional incitement to hatred, discrimination or violence. The sensitive situation regarding ethnic relations in Nepal cannot be resolved through the banning of difficult speech. Indeed, experience in countries around the world shows that resolution of deep-seated social tensions requires open discussion so that concerns and perspectives may be known, and anti-social views may be refuted publicly.

At the same time, a key problem in Nepal is the lack of diversity in the media, in terms of content but also in terms of ownership and staff. Action by both owners and regulatory authorities is needed to address this (see below for more detail on regulatory measures).

3.2.5 Privacy

Recommendation 12: A law on privacy should be adopted which clearly defines the scope of privacy and which establishes an appropriate balance between the right to private life and freedom of expression. No one should be liable for an expression which intrudes on another's private life where dissemination of the expression was justified in the public interest.

Article 28 of the Interim Constitution provides protection for privacy, stating: "Except on the circumstance as provided by law, the privacy of the person, residence, property, document, statistics, correspondence and character of anyone is inviolable". This is helpful but privacy is a complex area of law and this brief constitutional reference fails to provide guidance on a number of issues, including how to address apparent conflicts between freedom of expression and privacy. Nepal lacks specific legal rules on privacy, an important gap in the regulatory framework which needs to be addressed. In accordance with established international standards in this area, privacy should give way to freedom of expression where this is justified in the overall public interest, for example, where the expression exposes corruption or wrongdoing.

3.2.6 Blasphemy

Recommendation 13: All criticism honestly directed at a religion, no matter how trenchant, should be permitted. There is a difference between attacks on individuals on the basis of their religious affiliation (which may constitute hate speech) and criticism of a religion per se.

Article 23 of the Interim Constitution of Nepal guarantees the right to practice religion, while also prohibiting individuals from acting or behaving in a manner which infringes upon the religion of others. Nepal does not have any specific blasphemy law. The chapter on 'Adal' in the Civil Code prohibits the forceful conversion of others and a conviction for conversion or proselytising can result in fines or imprisonment.

3.2.7 Criticism of the Judiciary

Recommendation 14: Judges and others officials associated with the courts are public figures who should be required to tolerate criticism, particularly in relation to their official functions, although they, like everyone, may take advantage of available remedies, for example through the Press Council or in defamation law, to protect their reputations.

Recommendation 15: Rules restricting criticism of the institutions of the administration of justice should be limited to cases where this is strictly required to maintain the authority and/or impartiality of the system. Where these rules are applied, they should not be adjudicated by a judge who was him- or herself a target of the criticism.

A number of laws provide protection for the judicial system and judges against criticism. Section 18 of the Justice Administration Act 1991 empowers District Courts, Appellate Courts and subordinate courts to take action against contempt of court. Section 7 of the Supreme Court Act 1991 gives similar powers to the Supreme Court. These general provisions are backed up by Section 8(3) of the Cinema (Make, Release, and Distribution) Act 1970, which empowers the Cinema Censor Board to restrict the release of any movie which contains scenes that amount contempt of court. Furthermore, Article 60 of the Interim Constitution provides that neither the parliament (or legislature) nor the Constituent Assembly may discuss anything under judicial scrutiny or relating to the conduct of a judge regarding his or her judicial activities, except in the context of a judicial impeachment motion.

Although the law does not define contempt, court practice has established that it encompasses criticism of both judges and the judiciary. Courts have tried to establish some principles governing contempt of court, but they are neither comprehensive nor applied consistently. Criticism of judges, the administration of justice and the behaviour of judges and judgments, as well as revelations of judicial corruption, have all been included within the definition of contempt. It has been established that the judiciary should not be criticized for the mistakes of an individual judge. The official rational for this type of contempt has been that protecting respect for, faith in and the honour of the judiciary is necessary to uphold the justice system, which is essential for society and individual. At the same time, the application of contempt rules has become more liberal in recent years, due to changing social perceptions.

Courts establish their own procedures when cases of contempt come up. However, contempt is a strict criminal liability offence, whereby an act is enough for conviction, without the need to consider mens rea, or mental guilt. Conviction for contempt of court is a criminal offence which may lead to imprisonment or a fine or both.

It is well established under international law that the courts are public institutions and judged are public officials. As a result, it is important that these bodies and officials be open to public criticism. Powers of contempt of court have, in many countries, traditionally been abused to prevent such criticism and there is a need to amend the rules, in terms both of procedure and substance, to prevent that from happening in future. Expression should be subject to sanction only where this is truly necessary to protect the authority and independence of the judiciary, as opposed to preventing the judiciary from being embarrassed. The experience of other countries suggests that such criticism does not undermine the authority of the judicial institution or, outside of very particular cases, the fairness and impartiality of the judicial process. Furthermore, principles of natural justice (due process) demand that no judge should adjudicate in a case involving criticism of him- or herself.

While certain restrictions on free speech may be needed to protect the fair administration of justice, the restrictions in the Interim Constitution are far too broad. Judges, like parliamentarians, are public officials and they should, subject to laws of general application, such as defamation laws, be expected to tolerate criticism. The current laws are cast too broadly and are therefore open to abuse. It is a matter of particular concern that such restrictions are being imposed on parliamentarians, who have an obligation to discuss these matters.

3.2.8 Criticism of Parliament

Recommendation 16: Rules prohibiting statements about Parliament and Members of Parliament for statements made in Parliament should be abolished. This is without prejudice to Parliamentary powers to oversee the conduct of their business, including to prevent obstruction, or the right of Members of Parliament to take advantage of laws of general application, such as the defamation law.

As noted, Article 56 of the Interim Constitution provides for full protection for statements made at meetings of the legislature and/ or parliament and, similarly protects the publication of any "document, report, vote or proceeding" under the authority of parliament.

A number of provisions in the Interim Constitution, however, restrict free speech in relation to parliament. No one may question the good faith of any proceedings of the legislature and/or parliament, and the media may not carry material which "intentionally distorts or misinterprets the meaning" of any statement by a member of parliament (Article 56(3)). Pursuant to Articles 56(6)-(7), parliament has the exclusive power to determine whether or not a breach of these rules has taken place and to impose a sentence of up to three months' imprisonment or a fine of up to ten thousand rupees. Very similar rules apply to the Constituent Assembly, pursuant to Article 77 of the Interim Constitution.

The protections for free speech of parliamentarians are welcome and parallel similar protections in other countries. The restrictions, however, fail to conform to international standards relating to freedom of expression. It is central to the working of the democratic system that everyone be free to criticize parliamentarians. Indeed, as noted, elected officials should be required to tolerate a greater degree of criticism than ordinary citizens. Giving parliament itself the power effectively to prosecute the 'offence'

of criticism significantly exacerbates these problems. It is well-established that no one should be able to stand as judge in his or her own case.

3.2.9 Obscenity

Recommendation 17: Criminal rules prohibiting obscene materials should be set out clearly in law and should be based on the idea of harm, rather than mere offensiveness or moral values.

Section 2(c) of Some Public (Offence and Punishment) Act, 1970 prohibits printing, publishing, displaying or vending vulgar and obscene publications and materials. Conviction for breach of this rule is a criminal offence which can lead to imprisonment or a fine or both. The terms 'vulgar' and 'obscene' are not defined.

This general rules is supported by a number of specific rules. Section 15(1)(a) of National Broadcasting Act 1993, for example, prohibits the broadcasting of obscene advertisements. Section 14(e) of the Press and Publication Act 1991 prohibits the publication of materials in books, newspapers, and magazines which are contrary to decent public behaviour, morality, and social dignity. Similarly, Section 16(e) empowers government to prohibit the importation of publications from abroad which are contrary to decent public behaviour, morality and social dignity. Section 47(1) of Electronic Transaction Act, 2006 prohibits the publication or exhibition of materials contrary to public moral and decency. Finally, Section 8 of the Cinema (Make, Release, and Distribution) Act 1969 empowers the Cinema Censor Board to restrict the release of any movie that contains scenes which are contrary to the public benefit, decency and morality.

It is accepted that certain materials may be prohibited as obscene due to the fact that they may cause harm, for example to children or women. At the same time, the right to freedom of expression protects expressions which others may find offensive or immoral, if they do not cause harm, as well as unduly vague restrictions on freedom of expression. The rules noted above suffer both from excessive vagueness and from incorporating unduly low standards which are not based on harm but simply on offense. To provide protection against harm from obscene materials while also respecting freedom of expression requires that the law set out a clear and harm-based definition of what constitutes obscene materials.

3.2.10 Informal Harassment

Recommendation 18: The authorities should refrain from actions which are intended or likely to lead journalists and others to engage in self-censorship.

Recommendation 19: The State should not obstruct distribution of newspapers and should take measures to ensure that private actors do not do so either.

There are many examples and types of informal harassment in Nepal which curtail and hamper freedom of expression. Some examples are as follows:

- Attempts to influence broadcasters either to carry or not to carry certain content, especially on FM radio. In Banglung, for example, the Chief District Officer threatened an FM radio station for a programme providing information about the presence and absence of district

level officers in their offices during working hours. There was a high rate of absenteeism, so that many officers were embarrassed by the story.

- The Nepali authorities often demonstrate indifference when newspapers or journalists are attacked, or the distribution of newspaper is obstructed or vehicles vandalized.
- Access to the means of communication is sometimes denied to journalists and other media workers where such facilities are not available commercially. In many districts, journalists depend upon the District Police Office and Chief District Office for fax machines and access to the Internet.

Recommendation 20: The post office should not inspect, seize or refuse to distribute material based on its content in the absence of a court order to do so.

So far, there have not been any cases where the authorities directly obstructed the distribution of newspapers or the post office refused to distribute newspapers. However, the power of the post office to inspect or seize, or to refuse to distribute material based on its content, is still provided for by law. As a result, if material has to be sent through the post office, editors often engaged in self-censorship to avoid any risk of these forms of censure.

3.3 Media Regulation

Standards:

- All forms of media regulation should comply with international standards and, in particular, with Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights.
- A key goal of media regulation should be to promote pluralism and diversity in the media, including of ownership, outlet (types of media) and content.
- All bodies undertaking regulation of the media should be independent in the sense of being protected against both political and commercial influence.
- Greater cooperation among both stakeholders within Nepal and with international actors should be promoted with a view to ensuring best practices in the area of media regulation, in accordance with international standards.

These standards are fully consistent with the international standards outlined above. Members of the Stakeholder Group participating in the Agenda for Change meetings believe that they are particularly relevant in the Nepali context. Furthermore, the need for greater cooperation both among local stakeholders, and with international actors, was identified as a shortcoming in the current Nepali context.

3.3.1 Regulation of Media Workers

3.3.1.1 General Principles

Recommendation 21: There should be no system of licensing or other rules which restrict access to the profession of journalism.

Recommendation 22: There should be no general requirement for journalists

to obtain accreditation with the Department of Information. This is without prejudice to the right of journalists' associations to provide their own membership cards. Where accreditation is required for purposes of access to limited spaces, such as parliament or the courts, a transparent, impartial system should be put in place. The system should apply in a non-discriminatory manner to online journalists.

The Press and Publication Act 1991 requires journalists to obtain a 'Press Representative Certificate'. Both Nepali and foreign media organisations working in Nepal are required to send information about the names, qualifications and working area of their staff and representatives to the Press Council of Nepal. The Act provides for the government to provide a Press Representative Certificate or Temporary Press Representative Certificate to journalists who provide this information. The Department of Information is currently responsible for issuing these Certificates, known as a PRESS CARD, to journalists.

Journalists having a Certificate may collect news in their designated area in the manner provided for under the Press and Publication Act and other prevailing laws. Where a journalist has repeatedly breached the professional Code of Conduct adopted by the Press Council, the Council may recommend that the government suspend, in whole or in part, any official privilege or facility associated with the card.

This is, in effect, a registration system. In practice, many journalists in Nepal operate without the benefit of a card and they are still allowed to practise journalism. However, a non-democratic government which wanted to abuse the law could enforce these provisions in an attempt to control journalists. International standards prohibit the imposition of licensing rules on journalists or any system which allows for individuals to be excluded from the profession.

The question of licensing or registration is different from accreditation rules, which aim to provide special access rights to journalists in light of the fact that they act as a conduit for providing official information to the public. In practice, the PRESS CARD system does operate as an accreditation scheme at the moment. However, it should not be operated by government but by an impartial body, preferably by journalists' associations themselves.

Some institutions, such as the Supreme Court, issue their own cards to reporters (in that case specifically to legal reporters). They issue permanent cards to a number of journalists regularly reporting on legal issues, as well as temporary passes to journalists who just want to enter court premises for particular purposes. This is a pure accreditation scheme, of the sort described above.

3.3.1.2 Positive Measures

Recommendation 23: The government should take steps to ensure that adequate training opportunities are available for media workers, both formal and informal, print, broadcasting and new media, including on-the-job and upgrade training.

Recommendation 24: The government should be more proactive in fulfilling its obligation to protect journalists and media property, including by allocating greater resources and attention to this, particularly in conflict areas. Media outlets should be encouraged to provide adequate

insurance for journalists working in dangerous areas.

There are two leading cases where the government has totally failed to investigate and punish offenses against freedom of expression. The skeleton of Dekendra Thapa, a journalist from the Dailekh District who disappeared during the conflict, was discovered and family members filed a First Information Report (FIR) with the police station indicating the offenders. Despite this, there has been no investigation of the case and the alleged perpetrators are living freely. Similarly, Shah, a journalist, was kidnapped and killed by group of people. The offenders have still not suffered any legal consequences for this act.

Recommendation 25: There should be clear legal rules establishing a right of journalists not to disclose their confidential sources of information. These rules should allow for mandatory source disclosure only where ordered by a court and where this is absolutely necessary to protect an overriding interest, and the disclosure itself should be in camera.

Section 29 of the Right to Information Act protects whistleblowers – individuals who expose wrongdoing – from sanction. However, there is no specific legal protection for journalists who claim a right not to disclose the identity of their confidential sources of information.

Recommendation 26: A minimum wage should be put in place for media workers which should at least be enough to sustain a simple livelihood and this rule should be implemented in practice.

The new Working Journalists Act has been adopted and it provides for a minimum wage for journalists, but it is not being implemented properly. The wage commission has submitted a report to the government on how to decide the minimum wage.

3.3.2 Regulation of the Print Media

3.3.2.1 The Press Council

Recommendation 27: Structural reforms should be adopted to transform the Press Council into a fully independent body that operates on a pro-people basis. It should be self-regulatory in the sense that appointments are overseen independently of the government, even if it is formally established by law.

The Press Council of Nepal is a statutory body established by the Press Council Nepal Act to promote the standards of a free press. The law provides that the Council is an autonomous body having perpetual succession. However, the system of appointments to the Council is largely controlled by the government – with the government nominating 10 of the 14 members of the Council, including the chairperson – so that the independence of the Council is undermined as a matter of practice.

As noted above, pursuant to international law, bodies with regulatory powers over the media are required to be independent of government. Structurally changes must be made to the law establishing the Press Council to transform it into a properly independent body, operating in the public interest.

Recommendation 28: The independent Press Council should be responsible for complaints and applying the Code of Conduct.

One of the mandates of the Council is to take necessary action, upon receipt of any complaint regarding any news item published in any newspaper. The Act provides for the hearing and settlement of complaints against abuse of press freedom by media practitioners from any person or aggrieved party. Most of the complaints deal with alleged violations of the Code of Conduct prescribed by the Council for journalists. This role should continue to be exercised by an independent press council.

3.3.2.2 Other Regulatory Mechanisms

Recommendation 29: Classification of newspapers should be done by an independent body, based on the objective criterion of circulation.

Presently, classification of newspapers is done by the Audit Bureau of Circulation, which operates under the Nepal Press Council, and hence lacks independence, contrary to international standards in this area. The system is supposed to be based on the number of copies printed and the area of distribution of the printed material. Research suggests that only 40% of classification is based on objective factors, while the other 60% is subjective. The practice in most countries is for assessments of circulation to be carried out on a commercial basis, not by a statutory media regulator, like the Press Council.

Recommendation 30: Registration should be used only to maintain a body of information on the print media and for purposes of ensuring integrity of media titles. Registration should take place through local government offices rather than the District Administration Office (DAO). Print media outlets that are already registered as companies should not also have to register separately as newspapers. Newspapers should not be able to hold a title where they have not published under that title for more than two years.

In Nepal, District Administration Officers (DAO) have the authority to register newspapers and no newspaper may be published without such registration. The DAO issues a temporary certificate to applicants and forwards the information to the Press Registrar. After ensuring that there is no other newspaper with the same name, the press registrar gives its consent for the registration and the DAO then issues a permanent registration certificate to the newspaper.

For reasons of convenience, as well as to prevent undue government control, applications for registration should be submitted through local government offices rather than through the DAO. Furthermore, the rules should be revised to make it clear that the purpose of registration is to ensure up-to-date and accurate information on print media outlets, and not for any other purpose (such as to control the establishment of new print media outlets). Where a print media outlet is already registered as a commercial company, the information function is already taken care of, and these outlets should not also be required to register under the specific print media registration scheme. At the same time, print media outlets should not be able to 'occupy' a title, and hence prevent others from using it, where they do not publish under that title for more than two years.

Recommendation 31: The Press Registrar and key national libraries should maintain an archive of published newspapers.

At present, there is limited archiving of newspapers in Nepal. Some libraries maintain partial newspaper archives based on their particular interest and the needs of their customers. Some organizations keep ad hoc cuttings of particular sections of newspapers to facilitate their work. All newspapers have to submit a copy of each newspaper printed to the Nepal Press Council. The Press Council maintains archive of these publications and this is publicly available.

3.3.3 Regulation of Broadcasting

Standards:

- A key goal of broadcast regulation should be the promotion of pluralism and diversity in broadcasting.
- The editorial freedom of broadcasters should be respected.
- Broadcasters should be able to take full advantage of new technologies.

As with the overall standards for media regulation, these standards are in line with international standards. Once again, members of the Stakeholder Group which developed these recommendations, felt that they were of particular importance in the Nepali context.

Recommendation 32: A process should be put in place to plan the allocation of frequencies. The process should involve public consultations and ensure that adequate frequencies are allocated to the three sectors of broadcasting – public service, commercial and community – for both television and radio services. Frequency planning should also be undertaken with a view to promoting a transition to digital broadcasting in due course.

There have been no public consultations regarding a broadcast frequency plan and no such plan has been made public in Nepal, although the government claims to have developed one. Similarly, no plan has been made public for dealing with the process of conversion to digital broadcasting. Any discussion of this remains the purview of an internal government working group, and even the members of this group are not known to the public.

A broadcast frequency plan is central to the effective and public interest allocation of broadcasting licences. Such a plan should map the frequencies available for broadcasting across the country, and indicate how these are proposed to be allocated between different types and sectors of broadcasters. In the absence of such a plan, there is a risk that licences will simply be allocated on a first-come first-serve basis, rather than a wider consideration of the public interest.

Countries all over the world are in the process of making the transition from analogue to digital broadcasting technologies, which improves quality and also efficiency, in the sense of being able to fit more channels on the same amount of spectrum. While Nepal may not wish to make such a transition in the near future, particularly for radio broadcasting, it should still put in place some sort of planning system for this reasonably soon, with a view to ensure that such transition is the subject of wide public consultations, with a view to promoting the greatest public interest possible.

3.3.3.1 The Regulator

Recommendation 33: Broadcast regulation should not be overseen by a

government ministry but should be put in the hands of an independent regulatory body, which should benefit from structural protection against political, commercial and other interference. The regulator should be funded from State funds and its budget should be approved by parliament.

Currently, broadcast regulation and, in particular, the allocation of broadcasting licences, is undertaken directly by the Ministry of Information and Communication. There is no independent body, with members appointed in transparent manner which involves public participation. This opens up a clear possibility of political control.

International law requires States to establish independent bodies to regulate broadcasting. The rationale for this is clear, as supported by the experience of Nepal, where the period of the Royal regime witnessed serious interference with broadcasters' independence. The regulator should also be protected against interference from commercial interests, particularly existing commercial broadcasters, as this could also undermine its ability to operate in the public interest. Funding is central to the idea of independence; to protect against this, parliament, rather than the government, should approve the budget for the regulator.

Recommendation 34: The broadcast regulator should, in consultation with interested stakeholders, develop a detailed code of conduct for broadcasters. The regulator should also be responsible for implementing the code, by putting in place a complaints system for the public and through direct monitoring and evaluation.

At present, there is no specific regime governing content in the broadcasting sector in Nepal. With the rapid recent growth of the broadcasting sector – especially in the FM radio and private television sectors – many stakeholders are calling for a content regulation system to be put into place to promote quality standards and to provide protection against abuses.

Formally, broadcasters have to adhere to the Code of Conduct issued by the Press Council, since the Code describes 'media' as newspapers, radio and television broadcasters, news agencies, and organisations and services producing and/or disseminating informative and news-oriented programmes online. The Code of Journalistic Ethics applies to all journalists, regardless of the specific media sector they work in. However, in practice this system fails to provide adequate protection to the public, among other things because the Council lacks the ability to enforce its decisions.

Section 11 of the Broadcasting Act 1993 sets out a number of content rules for broadcasters, such as that they must provide development programming and that they must not disseminate programmes that have an adverse impact on relations with neighbouring countries. These rules are problematical since they are extremely vague and seek to impose unreasonable limitations and impositions on broadcasters. At the same time, they are not presently being enforced in practice, although the possibility remains that they could be. A code of conduct developed by the regulator in consultation with broadcasters would be unlikely to suffer from these problems.

3.3.3.2 Licensing

Recommendation 35: All broadcasters, including satellite and cable operators,

should be required to obtain a licence through a fair and transparent process. Licences should be given for set periods of time but may be allocated to the same applicant again where they have met their licence conditions. Licensing procedures should be adapted to the different broadcasting sectors. Community broadcasters, in particular, should benefit from less onerous procedural requirements, including in relation to licensing fees.

Section 4 of the National Broadcasting Act 1993 provides that "no one shall broadcast any program without obtaining a license pursuant to this Act". Any person or body corporate intending to broadcast any program by way of satellite, cable or other means of communication, or to establish a frequency modulation broadcasting system, must submit an application the government in the prescribed format and with the prescribed fee (Section 5). Upon receipt of an application, the government may, after conducting an inquiry, issue a licence (section 6). Pursuant to section 10, the government may prescribe such fee as it sees fit.

These provisions are problematical for a number of reasons. They do not set out a fair and transparent system for the allocation of licences, so that the government might arbitrarily refuse to grant a licence on unreasonable grounds. They fail to establish standard conditions for licences, such as their duration, the fee structure and a duty to abide by the code of conduct discussed above. They also fail to recognise the differences between commercial and community operators and, in particular, the need for less onerous licensing processes and fees for community broadcasters. There is, therefore, a need for a complete overhaul of this system to bring it into line with the standards set out above.

Recommendation 36: The 4% royalty currently levied on broadcasters should be abolished. A set percentage of the licensing fee paid by broadcasters should be allocated for professional development and capacity building in the sector.

Fees are collected from broadcasters in two ways. First, there is a 4% royalty charged on the basis of overall transactions and, second, there is a licence renewal charge each year. The renewal charge for television is a minimum of Rs. 300,000 (approximately USD5,000) and for radio is Rs 10,000. The royalty is collected by the Ministry of Information and Communication on behalf of the government and it goes directly to national treasury. It is thus used for general State purposes and very little of it goes for professional development and capacity building for the media.

3.3.4 Public Media

Recommendation 37: There should be no government print media. Rastriya Samachar Samiti (RSS), the national news agency, should be transformed into an autonomous public body. There should be no news agency monopoly.

Gorkhapatra Corporation, a government owned and controlled body, publishes two major dailies, namely **Gorkhapatra**, in Nepali, and **The Rising Nepal**, in English. Although formally public in nature, these newspapers are effectively controlled by government and lack a mandate to

operate in the public interest. There have been numerous discussions about what to do with these newspapers. Suggested solutions include privatisation, or selling them off, and transforming them into public service outlets. Members of the Stakeholder Group do not believe that it is in the interests of the public for there to be government print media.

Rastriya Samachar Samiti (RSS), the national news agency, is likewise a government-controlled entity which, furthermore, enjoys a monopoly status (i.e. it is prohibited for others to establish private news agencies). International law prohibits government controlled media outlets, including news agencies, since this creates a risk of biased reporting and the abuse of public funds to support the government of the day. Instead, RSS should be transformed into an autonomous public body, much like the public service broadcasters that exist in many countries.

Recommendation 38: The existing State broadcasters – Nepal Television and Radio Nepal – should be transformed into independent public service broadcasters. The new public service broadcasters should have clear mandates set out in law, including to provide public interest broadcasting that serves the needs of all sectors of Nepali society. These broadcasters should be funded directly from the State budget in accordance with a budget approved by parliament. They should be accountable to the people through the parliament, as well as through direct means, such as surveys and feedback sessions.

Radio Nepal distributes both AM and FM radio channels and Nepal Television operates two television channels. Both are owned and controlled by the government. As noted, international law prohibits government control over public media and, instead, calls for them to be transformed into independent public service broadcasters operating in the public interest. There are a number of aspects to this. They should be overseen by an independent board that is appointed in a fair and transparent manner, with the involvement of civil society. They should be given a clear mandate to operate in the public interest. As with the broadcast regulator, parliament, not the government, should approve the budget.

The present structure of Nepal Television and Radio Nepal signally fails to meet these standards. The adoption of a new public service broadcasting law is needed, setting out in detail the mandate and structure of these bodies, including as regards accountability and funding.

3.3.5 Subsidies and Tax

Recommendation 39: There should be no direct public subsidies for the private media; support should be provided only through indirect measures, such as subsidies on newsprint or general tax relief measures. Subsidies should be applied in a non-discriminatory manner to all media and media sectors.

Recommendation 40: A tax should be levied on advertising revenues which should be used to promote capacity building and media development in the public interest, as overseen by an independent and representative body.

At present, there is no specific system of subsidies for the media. Taxes on the media

go to the national treasury and are not allocated for capacity building and media development.

3.3.6 Ownership Rules

Recommendation 41: Measures should be put in place to ensure transparency of media ownership.

Recommendation 42: The broadcast regulator should develop the capacity to measure market share for both the print and broadcaster sectors and should put in place an ongoing system for monitoring this. There should be an obligation to inform the independent broadcast regulator about proposed media mergers in both the print and broadcast sectors (including cross-media mergers).

Recommendation 43: Where a proposed media merger might lead to a situation of undue concentration of control, the broadcast regulator should have the power to prevent it. Undue concentration of control is defined as control of 25% or more of a particular media market – print, radio or television – as measured by reference to market share, advertising revenues and capitalisation.

Recommendation 44: No one should have control over media from more than two media sectors (print, radio or television).

There is at present a growing problem of media concentration, which is exacerbated by the absence of any rules on ownership concentration. Some major media companies operate print, radio, television and online services. Specific and comprehensive law is required to address this problem.

Recommendation 45: Foreign investment in the media should be permitted but capped at a level which protects against foreign control of any media outlet in terms both of management and editorial output. Chief editors and chief executive officers of media outlets should be Nepali citizens.

At present, there are no rules providing for transparency of media ownership, over and above the rules which apply as a result of the commercial form of media outlets (for example as private or public corporations). As a result, it is difficult to obtain reliable information on who owns which media. This is clearly not in the public interest as media consumers do not know who is ultimately behind the media they read, listen to or view. It would be preferable to put in place a clear system for transparency in relation to media ownership.

Media concentration was a hot topic in Nepal when the Royal regime wanted to abolish particular media houses operating both print and broadcast media (both radio and television). The Government formed a commission to make recommendations on the issue and it also enacted a notorious media ordinance requiring media houses to close one media if they were operating three or more at one time. However, when the Royal regime fell, the ordinance also lost its validity, so there is presently no law dealing with media concentration.

There is presently no body with formal powers to monitor media concentrations. Some media houses have holdings in all three main media sectors, namely print, radio and television. There is also no law on foreign investment in the media, although the government does have a policy on this. The Foreign Investment and Technology Transfer

Act 1992 provides a specific list of areas where foreign investment is restricted, and the media does not feature on that list.

3.4 The Right to Information

3.4.1 General Principles

Recommendation 46: The right to information should apply broadly to everyone and to all information held by all public bodies, including the legislature and the courts.

Article 27 of the Interim Constitution guarantees the right to information. It provides that every citizen has the right to seek and receive information of a personal nature or relating to matters of public importance, provided that no one shall be required to provide information which has been declared secret by law. These provisions are also reflected in the Right to Information Act 2007, which provides for a right of citizens to access information of public importance. It would appear that the right applies to all public bodies, including the legislative and judicial branches of government, although this is not absolutely clear from the text of the legislation and the matter has not yet been addressed clearly in practice.

While these guarantees are positive, at the same time they are unduly limited. Under international law, everyone, not just citizens, should benefit from the right to information, just as everyone enjoys the right to freedom of expression. This is reflected in the right to information laws of many countries around the world, which have not suffered any negative consequences as a result of this.

Furthermore, the right should apply to all information, not just personal information or information deemed to be of public importance. It is not for the authorities to determine what is of public importance; the fact that someone requests information is sufficient. Furthermore, such a limitation gives the authorities ample scope to illegitimately refuse to provide information, to the detriment of the right to information.

Recommendation 47: Exceptions to the right of access should be limited to cases where disclosure of the information would cause serious harm to a protected interest and this harm is greater than the public interest in disclosure.

Article 3(3) of the Right to Information Act establishes the regime of exceptions to the right of access. Five categories of interests are listed whose protection could justify a refusal to disclose information, such as national security and privacy. A public body may only invoke these exceptions if there is an “appropriate and adequate reason”. The article also contains a severability clause, which applies when a request is made for a record which contains some information that can be released and other information to which an exception applies. Any information in the record which is not subject to the exception shall, to the extent it can be severed from the rest of the information, be disclosed.

In general, the regime established by Article 3(3) is positive in the sense that it is relatively limited in nature. However, it is not fully in line with the standards set out above. It includes some exceptions that are not found in other right to information laws, specifically an exception to safeguard the “harmonious relationship subsisted among various casts or communities”. While this is undoubtedly an important social goal, it is hard to see how the release of information held by a public

body could harm this interest and, in any case, this would already be covered by the exception to protect public order.

Importantly, the Act does not include a public interest override, whereby information should still be released where this is in the overall public interest, even if it might harm a legitimate interest. This is an important safety value, to ensure, for example, that information about corruption and other forms of wrongdoing reaches the public.

Recommendation 48: A central fee structure should be put in place for requests that does not exceed actual photocopying costs and that provides for fee waivers for the poor and for public interest requests.

It is important that a fee structure be put in place which does not deter potential requesters from lodging requests for information since this will undermine proper implementation of the system. Article 7 of the Right to Information Act provides for a tariff of charges for accessing information to be established, which should be reasonable and not exceed the actual cost of providing the information. Draft right to information regulations published in 2008 set a fee of Rs. 1 per page. Neither the Act nor the draft regulations, however, establish a system of fee waivers for the poor or for public interest requests.

Recommendation 49: A data protection law should be adopted, setting out clear rules on the collection, storage and use of personal data.

There is at present no data protection law in Nepal. Such a law would set out clear rules for the collection, retention and use of personal information. It would protect individuals against the illegitimate collection of personal information about them, whether by a public or a private body. It would also ensure that personal information could not be retained once it had served the purpose for which it was collected. Finally, it would ensure that personal information could not be used for purposes other than those which justified its collection in the first place. Among other things, this would involve setting out rules regarding the disclosure of personal information to third parties. All of these are benefits which should apply in Nepal, as they do in democracies around the world.

3.4.2 Implementation

Recommendation 50: A key priority is for the Right to Information Act to be implemented. This requires both formal implementation measures – such as appointment of the National Information Commission and information officers, and the proactive publication of information – and the adoption of effective procedures and practices to give effect to the Act in practice.

The first step towards implementing the RTI Act was taken with the appointment of members of the National Information Commission earlier in 2008. Although welcome, this is just a first step. As far as we are aware, very few, if any, public bodies have appointed information officers or taken steps to bring their proactive publication efforts into line with what is required by the RTI Act. These are both essential implementation measures.

An initial draft Regulation on the Right to Information was published in January 2008 for purposes of consultation. It is our understanding that the Drafting Task Force submitted a draft of the RTI regulations to the

Ministry of Information and Communication and that the Ministry, in turn, asked for suggestions and comments from the National Information Commission. The regulations have not yet been forwarded to Cabinet for final endorsement.

ARTICLE 19, Freedom Forum and FNJ produced an analysis of the draft regulations in June 2008. The draft contains a number of positive features. It respects and elaborates upon the positive provisions in the main law, it protects appeals against being withdrawn and it moves implementation of the RTI Act forward. At the same time, there are some problems with it, in particular inasmuch as it fails to address a number of key issues. Important matters such as conditions of service for Commission members, a clear fee structure for the provision of information, the budget of the Commission, the promotional roles of the Commission, the enforcement of decisions of the Commission and the process for developing standards on classification are not dealt with in the draft regulations. The draft regulations also include somewhat confusing provisions on the role of the secretary of the Commission and excessively formal rules regarding the processing of appeals.

Recommendation 51: The government should demonstrate clear political will at the highest levels to support the right to information and effective measures should be put in place to address the culture of secrecy, including the provision of adequate training to public officials and, in particular, to information officers.

Although the government has made a formal commitment to respect and promote the right to information, it has not taken many concrete steps to deliver on that commitment. There has so far been very little dedicated training of public officials and, as noted above, information officers have not even been appointed, much less trained. This is unfortunate, since delay in putting the RTI Act into practical effect may lead to public disillusionment and disengagement, which could have a longer term negative impact on implementation.

3.4.3 The Commission

Recommendation 52: The appointments process for the Commission should allow for broad civil society input, including as representatives on the appointments committee, through a process that is open and participatory manner and that allows members of the public to nominate candidates.

The Nepali Government appointed the members of Information Commission in accordance with section 11 of the RTI Act, which provides for an appointments committee. There was no mechanism by which members of civil society or the wider public could propose members of the Commission or any public hearing regarding those proposed to be appointed as members. However, the appointments committee established pursuant to section 11 of the Act seems independent. Very recently, the government appointed the Secretary of the Commission. Although in accordance with the law, this move could undermine the independence of the Commission.

Recommendation 53: The National Information Commission should be given a wide promotional role, including to publish a code of practice on record management, a guide or code on minimum standards for proactive publication

and a guide for the public on how to use the RTI Act, to provide training on implementation of the Act to civil servants, and to conduct public awareness campaigns.

One of the serious shortcomings of the RTI Act is that it fails to give the National Information Commission a broad promotional role in relation to the right to information. The Commission does have some promotional responsibilities, for example in relation to record management and proactive publication. At the same time, it could be given responsibility for other tasks, such as publishing a code of practice on record management, a guide or code on minimum standards for proactive publication and a guide for the public on how to use the RTI Act, providing training on implementation of the Act to civil servants and conducting public awareness campaigns. As noted, the draft regulations fail to address this shortcoming.

3.5 The Internet

3.5.1 Access

Recommendation 54: The government should put in place a process to adopt a national policy or e-strategy aimed at promoting greater access to the Internet. The process should involve consultations with a wide range of stakeholders. Part of the strategy should be to provide Internet connections and facilities in public places – such as schools, post offices, local NGOs, universities, libraries and so on – with a view to providing local people throughout the country with affordable access to the Internet.

There is currently no national policy on the Internet or any plan to adopt one. At the same time, the Education Ministry has started to provide Internet facilities at public schools in remote parts of the country, although this is neither consistent nor well implemented.

Recommendation 55: More public resources should be allocated to creating a positive environment for the provision of Internet services, including by building infrastructural systems, such as the provision of electricity, telephone services, the Internet backbone and so on, particularly in the rural areas. Priority should be given to making full use of available wireless spectrum. A more competitive and free environment should be created to foster the development of Internet services. There should be no discrimination between public and private ISPs in the availability of services. The National Telecommunications Authority should be made more independent and effective, particularly in relation to the regulation of pricing.

At present, Nepal Tele Communication (NTC) has a form of monopoly over the distribution of Internet access and there is a sense that public ISPs are treated more favourably than private ones. A new Optical Fibre Highway is being developed which should be open to everyone, not just the NTC. Code Division Multiple Access (CDMA) phone is now available in all 75 districts, and it is possible to use this to connect to the Internet. Some public resources are being used to create a more positive environment for the Internet, but most observers believe that far too little is being done.

3.5.2 General Content Restrictions

Recommendation 56: The application of general content restrictions should

take into account the special nature of the Internet as a communications platform and be consistent with constitutional and international tests for restrictions on freedom of expression.

Recommendation 57: ISPs and other service providers should not be liable for content unless they have endorsed it or are ordered by a court to remove it.

Recommendation 58: Jurisdiction should only be exercised over Internet content where it has been uploaded in or is directed towards Nepal.

There are presently no specific laws governing the above issues in Nepal, Law is essential.

3.5.3 Regulation

Recommendation 59: There should be no special licensing or registration of the Internet, including for individual websites and ISPs. This is without prejudice to general registration as a commercial entity. National domain names, however, should continue to be regulated but only for purposes of maintaining the integrity of unique domain names, in accordance with a clear framework of rules which are consistent with international standards in this area.

The national domain is overseen by a private entity at the moment, rather than an independent body. ISP are required to be licensed under Nepali law.

Recommendation 60: Editors of websites who wish to be considered as mass media, if they meet the conditions for Nepali mass media (aimed at the general public, edited content, mass media character, issued regularly and hosted on a domestic ISP) should be able to submit themselves to the jurisdiction of the appropriate regulatory bodies (e.g. for print or broadcast media).

3.6 Film

Recommendation 61: Films should not be subject to prior censorship.

Recommendation 62: The Censor Board should be abolished and the Film Development Board should be transformed into an independent body with representation from different social and professional sectors, and which operates in the overall public interest. The Film Development Board should be responsible for allocating funding support and for putting in place a system for classifying films and videos, based on age and content, in accordance with the guarantees of freedom of expression in the Constitution.

At present, the Film Censor Board, in accordance with its name, operates a censorship system for films. It is established by the Film (Making, Release and Distribution) Act 1969 as a government-controlled body with members appointed by and under the influence of the Nepali government. Apart from its censorship functions, the Film Board does not classify films on the basis of the appropriate viewer age.

The Film Development Board, formed by government decision, operates a fund for the development of films. Making films

relating to political ideology is a major issue at present and there have been allegations that the fund is politically influenced. Funds tend to be channelled to producers who use new technology or to films which promote the culture, language and identity of different ethnic groups and different sections of society.

3.7 Advertising

Recommendation 63: An independent body should be established to regulate advertising in accordance with the following principles:

- A code of advertising practice to govern the content and production of all forms of advertising should be developed in consultation with stakeholders. The code should be applied through monitoring and complaints and should provide for sanctions such as warnings, corrections, a requirement to remove the offending advertisement and fines.
- Public service advertisements sponsored by public funds should be allocated on a proportional basis among the media.
- Commercial public advertisements (e.g. tenders) should be allocated in a non-discriminatory manner in accordance with a clear and objective set of rules based on market considerations such as circulation and coverage, including to local media.
- Clear and non-discriminatory rules should be put in place governing political advertisements (defined as advertisements which aim to secure the election of political parties and candidates).

At present, there is no central set of rules governing advertising, including no code of advertising practice and no independent body with responsibility for regulating advertisements. There are rules in some laws which address advertising. Articles 14 and 15 of the National Broadcasting Act 1993, for example, generally permit broadcasters to carry advertisements but 'discourage' advertisements for tobacco or alcoholic drinks. They also prohibit advertisements which adversely affect political parties, vulgar advertisements, and advertisements which promote violent overthrow of the government, create unusual fear in the public, are contrary to Nepal's policy of non-alignment or are insulting to ethnic groups, language, religion or culture. These rules are subject to direct enforcement by the government, rather than by an independent body.

Public service advertisements are distributed to print media on the basis of classification, while commercial public advertisements are largely allocated to the government media, specifically to Gorkhapatra, Radio Nepal and Nepal Television.

Political advertisements were allowed during the recent Constituent Assembly Election by decision of the Election Commission. Generally, however, political advertisements are not permitted.

4. Conclusion

This Report, and particularly its recommendations, is intended to serve as a sort of blueprint for reform in Nepal in the area of freedom of expression. The recommendations were adopted by the Stakeholder Group, which represents a wide cross-section of Nepali society, including both men and women, different communities and minority groups within Nepal, and a variety of different social sectors with an interest in freedom of expression issues, such as the media, civil society groups, legislators and legal professionals.

We believe that the recommendations present a robust and comprehensive platform for advocacy for change in this area, which we believe will remain relevant in the near to medium future. They are the product of a process of intensive research, debate and thought, which took place over a period of many months, and which involved many of the leading Nepali thinkers and activists working on issues relating to freedom of expression. Each recommendation has a solid grounding in both Nepali law and practice, and in international standards of respect for freedom of expression.

The three organisations which have led this process – ARTICLE 19, Freedom Forum and the Federation of Nepali Journalists – along with members of the Stakeholder Group, while recognising the enormous challenges facing implementation of the recommendations, are committed to continuing to work together to this end. We hope that an increasingly broad coalition of actors will join with us in supporting comprehensive reform in this area. We are sure that this will benefit not just freedom of expression in Nepal, but also democracy itself, as well as wider social goals including sustainable and equitable development.

ANNEX

Members of the Agenda for Change Stakeholder Group

1. **Mr. Gokul Pokharel**
   Chairperson, Nepal Press Institute

   Mr. Pokharel is the Chairperson of NPI and a senior journalist who has served in numerous taskforces formed by the government on different freedom of expression issues. He was in the senior management team of Gorkhapatra, the government newspaper and the national news agency for many years. He is also a former member of the National Human Rights Commission.

2. **Mr. Govinda Acharya**
   Vice-Chairperson, Federation of Nepali Journalists

   Mr. Acharya is a career journalist and newly elected vice-chairperson of the Federation of Nepali Journalists (FNJ). He was detained illegally for more than one and half year during conflict period.

3. **Mr. Tankaraj Aryal**
   Citizens' Campaign for Right to Information

   Mr. Aryal is a human rights lawyer with significant expertise in freedom of expression. He worked for Open Society Institute and presently associated with ARTICLE 19 as Country Representative.

4 **Mr. Taranath Dahal**
   Former Chairperson, Freedom Forum

   Mr. Dahal has served as president of Federation of Nepalese Journalist as well as Chairperson of National News Agency, state owned news agency and many other taskforces viz. Taskforce on the Right to Information and the Taskforce on the Working Journalists Act as an expert of media policy and laws. He is the president of the Freedom Forum.

5. **Ms. Durga Sob**
   Chairperson, Feminist Dalit Organization (FEDO)

   Ms. Sob the Chairperson of Feminist Dalit Organization and a well-known a social and Dalit activist.

6. **Mr. Dhrubahari Adhikari**
   Senior Journalist

   Mr. Adhikari is a senior journalist and he was a member of the High Level Media Commission. He has been engaged as a media policymaker in various taskforces in the past.

7. **Mr. Padam Singh Karki**
   IPI Nepal Chapter

   Mr. Karki is a senior journalist and chairperson of International Press Institute, Nepal Chapter, a leading media

organisation which has participated in the International Mission.

8. **Mr. Pratik Pradhan**
   Carrer Journalist

   Mr. Pradhan is the former chief editor of the Kathmandu Post, a leading English-language daily. He is now the CEO of a new daily, which has yet to be launched, called Republica. He is also engaged in a number of media reform initiatives, including as a member of the High Level Media Commission.

9. **Ms. Pratima Pyakurel**
   Rights Activitst

   Ms. Pyakurel is a social activist involved in women's organisations in the central Terai of Nepal. She is engaged in promoting human rights among women in that part of the country.

10. **Mr. Badri Bahadur Karki**
    Former Attorney General

    Mr. Karki is the former Attorney General of Nepal and a well-known legal expert. He had served as the Convener of the committee formed by the government to restructure and reform government media.

11. **Ms. Babita Basnet**
    Chairperson, SANCHARIKA Samuha

    Ms. Basnet is a career journalist, social and women's rights activist and also was a member of the High Level Media Commission and other official task forces.

12. **Mr. Babu Ram Aryal**
    Former Officer with the Federation of Nepali Journalists

    Mr. Aryal is a lawyer formerly associated with the Federation of Nepali Journalists, now working as an independent legal expert specialising on cyber law, media law and freedom of expression.

13. **Mr. Bishnu Nisthuri**
    Former President, Federation of Nepali Journalists

    Mr. Nisthuri is the immediate past president of the FNJ. He has served in numerous committees and taskforces constituted to reform freedom of expression regime in Nepal including the Taskforce on the Right to Information and the High Level Media Commission.

14. **Ms. Bishnu Sharma**
    Career Journalist

    Ms. Sharma is a career journalist and social activist representing women's human rights. She is also associated with Freedom Forum.

15. **Mr. Mahendra Bista**
    Former Secretary General, Federation of Nepali Journalists

    Mr. Bista is well-known career journalist and media activist and has played a leading role in FNJ for many years.

16. **Ms. Mohammadi Siddiqui**
    Member Constituent Assembly

    Ms. Siddiqui is a Constituent Assembly member and a well known Muslim social activist.

17. Mr. Raghu Mainali
Executive Director, Community Radio Support Center

Mr. Mainali has been engaged in policy development for community radio for more than a decade and was a member of the High Level Media Commission.

18. Mr. Rajendra Dahal
Former Chairperson, Press Council of Nepal

Mr. Dahal is the former Chairperson of the Press Council of Nepal, an autonomous statutory body established by law to regulate the media. He is a well known expert in media policy issues in Nepal.

19. Mr. Radheyshyam Adhikari
Senior Advocate and Member of the Constituent Assembly

Mr. Adhikari is a prominent lawyer and member of Constituent Assembly. He was the Coordinator of the High Level Media Commission.

20. Mr. Laxman Datt Pant
Rights Activist

Mr. Pant is a media practitioner and activist formerly working with INSEC, the largest human rights organisation in Nepal, and now involved in a media company and journalism college.

21 Mr. Suresh Acharya
Former President, FNJ

Mr. Acharya is currently working as the coordinator of the Minimum Wage Determination Committee for journalists, constituted by the government of Nepal. He has been engaged in media policy reform for many years.

22. Mr. Hem Bahadur Bista
Director, Media Support International

Mr. Bista is the former Chairperson of Nepal Television, the State television, He has been engaged in the process of media and freedom of expression policy review for decades.