



Memorandum

on the

Kenyan Media Bill, 2010

February 2011

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The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

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OVERVIEW OF RECOMMENDATIONS

Recommendations on the functions of the Media Council (“the Council”):

- Consideration should be given to narrowing the Council’s mandate and making it more focused.
- The Media Bill should provide more guidance to the Council on how it is to perform its functions other than handling complaints. In particular, the Bill should clarify what types of activities the Council is expected and permitted to undertake and where necessary the procedures it is required to follow.
- In line with Article 34(5)(b) of the Constitution, the Media Bill should contain a provision requiring the Media Council to perform its functions in the interests of all sections of the society.
- Consideration should be given to scrapping the Council’s power to compile a register of journalists from Section 4(k) as well as removing the power to impose a levy on them from Section 20.
- At a minimum, the Media Bill should cap the height of the levy the Media Council may impose at a level which does not discourage entry into the profession of journalism; the definition of ‘journalist’ for these purposes should be reviewed to exclude those not engaged in a regular and professional manner in the dissemination of information to the public via the media.

Recommendations on membership and the appointment process:

- The criteria for eligibility to serve on the Council should be consolidated into one provision.
- Possessing ten years of experience in a relevant field should not be a requirement for membership of the Council. Rather, the interview committee and Chief Justice should be required to ensure that the Council they appointed is both broadly representative of the public and includes sufficient expertise in relevant fields.
- The requirement for the Chairperson to be qualified to hold the position of judge of the High Court should be removed.
- The Media Bill should ensure sufficient gender balance on the Council, for example by requiring that three or four of its nine members should be of opposite gender.
- Candidates should be required to be “committed to” the values of Chapter 6 rather than “meeting” these requirements.
- Persons who hold a substantial direct or indirect financial interest in one or more media companies should be explicitly ineligible to serve on the Council.
- No representative of the Ministry of Justice, National Cohesion and Constitutional Affairs should be involved in the process of selecting Council members.
- Vacancies on the Council should be announced in mainstream media as well as the Gazette, and at least 3 weeks should be allowed for applications.
- The Bill should clarify who has the power to remove a member of the Council if one of the grounds mentioned in Section 11 occurs. Consideration should be given to entrusting this responsibility to the Judicial Service Commission.
- Loss of eligibility for appointment to the Council should be added as an additional ground to remove a member.

- ‘Inability or unfitness’ to discharge the functions of a member of the Council is too vague a criterion and should not be a separate ground for removal.
- Any decision to remove a member of the Council should be subject to judicial review.
- The numbering of the Bill’s sections should be corrected.

Recommendations on accountability of the Council:

- The Council should be required to publish an annual report explaining its objectives and activities over the past year to the public.

Recommendations on funding arrangements:

- The Council’s power to impose a levy on media companies should be subject to a requirement that the levy may not be set at such a level as to compromise their ability to engage in quality journalism.
- The Council should be prohibited from receiving donations or grants, directly or indirectly, from media companies, their owners and employees.
- Consideration should be given to relaxing the ban on foreign sources of funding insofar as these pose no credible threat to the Council’s independence.

Recommendations on complaints and dispute settlement:

- Consideration should be given to selecting the Complaints Commission from amongst the Council’s own members, rather than recruiting and remunerating an additional five persons.
- The risk of parallel litigation on the same issue before the Independent Communications Commission of Kenya and the Complaints Commission should be addressed.
- The power to issue reprimands under Section 30 should not be limited to reprimands of journalists and media enterprises.
- Appeals to the High Court against a Council decision on a complaint should not be limited to points of law.
- All Complaints Commission and Council decisions should be published in the Gazette. Names of persons can be anonymised where appropriate.
- The residual penal provision in Section 39 should be removed.

Recommendations on the Code of Conduct:

- Section 36 of the Media Bill should state clearly that whether a complaint against a journalist or media company is well-founded will be judged according to the Code of Conduct set out in the Second Schedule to the Act.
- The Code of Conduct should not seek to define the “fundamental objective” of journalism, require all sides of each story to be reported or require comment to be obtained from any person mentioned in an unfavourable context. Section 1(a) should be deleted.
- Requirements for journalists to avoid “bias” should be deleted from Sections 1(h) and (i). The applicable rule should be that stated in Section 1(d), that while partisan reporting is permitted, comment, conjecture and fact should be clearly distinguished.
- Sections 1(e) and 11(b), prohibiting “provocative or alarming” headings and requiring headings to reflect the article they introduce, should be deleted.

1. INTRODUCTION

This Memorandum provides ARTICLE 19's analysis of the Kenyan Media Bill, 2010 (hereinafter "the Media Bill")¹ against international standards on freedom of expression. ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. The present Memorandum builds upon ARTICLE 19's numerous previous analyses of Kenyan draft and adopted legislation in the area of freedom of expression and the media. These have included commentaries on the Media Council of Kenya Bill 2006,² the Freedom of Information Bill,³ the Communications (Broadcasting) Regulations 2009⁴ and the harmonised Draft Constitution.⁵

The Media Bill proposes to introduce a number of changes to the existing Media Act enacted in 2007. The Act, which stirred some controversy at the time of its promulgation, transformed the struggling, voluntary Media Council of Kenya (hereinafter 'the Council') into a statutory body with a broad mandate in media matters, ranging from the mediation of disputes between government and press to the promotion of professional standards amongst journalists and the protection of media freedom. Notably, the Council also gained the power to issue legally binding decisions on complaints lodged by or against journalists and media enterprises.

The amendments contained in the Media Bill seek to align the Council's functioning with the Constitution as amended in 2010, and in particular with the its provisions on freedom of expression and freedom of the media. The proposed changes are limited in scope yet not insignificant, as they will substantially overhaul the appointments process for members of the Council.

This Memorandum considers the Media Bill in its entirety, including both the amendments and those provisions which would remain unchanged under the proposal. On the one hand, we express significant reservations about the concept of statutory regulation of media ethics and standards (in Section 2 below). On the other hand, the analysis finds the Media Bill will provide substantial safeguards of the Council's independence, as well as other positive features including a Code of Ethics which is largely compatible with international standards. A number of provisions do raise concern about the compatibility of the Bill with international law and constitutional protections of freedom of expression. Specific recommendations are offered throughout on how these concerns could be addressed.

¹ The text of the Draft Law can be accessed at http://www.information.go.ke/index2.php?option=com_docman&task=doc_view&gid=18&Itemid=37 or on request from ARTICLE 19.

² ARTICLE 19, Statement on the Draft Media Council of Kenya Bill, March 2006. Available at <http://www.article19.org/pdfs/analysis/kenya-media-council-bill.pdf>.

³ ARTICLE 19, Memorandum on Kenya's Freedom of Information Bill, 2005, January 2006. Available at <http://www.article19.org/pdfs/analysis/kenya-foi.pdf>.

⁴ ARTICLE 19, Memorandum on the Kenya Communications (Broadcasting) Regulations, 2009, November 2009. Available at <http://www.article19.org/pdfs/analysis/memorandum-on-the-kenya-communications-broadcasting-regulations-2009.pdf>

⁵ ARTICLE 19, Memorandum on the Harmonised Draft Constitution of Kenya, published on 17 November 2009 by the Committee of Experts on Constitutional Review Focus, December 2009. Available at <http://www.article19.org/pdfs/analysis/kenya-comment-on-the-harmonised-draft-constitution.pdf>

2. THE PRINCIPLE OF STATUTORY REGULATION OF THE MEDIA

When commenting on the Media Council of Kenya Bill in March of 2006,⁶ ARTICLE 19 expressed its serious concern both at the object of the Bill – the creation of a statutory media council – and at a range of specific provisions, which would have given the Council inappropriate powers to licence journalists while exposing it to a risk of government interference.

Subsequent revisions of the Bill placed the Council’s independence from government on a more solid footing and also addressed a number of other problematic aspects of the proposal. However, the Act as adopted did enshrine the statutory character of the Council, transforming it from an – admittedly dysfunctional – voluntary body into a State-sanctioned authority with binding powers.

Without wishing to rehearse all the arguments set out in the 2006 Commentary, we briefly discuss the reasons why democracies tend to take a dim view of statutory regulation – at least for non-broadcast media, as the scarcity of broadcasting frequencies necessitates a mechanism to allocate these equitably – and why, in the words of the *Declaration of Principles on Freedom of Expression in Africa*, “[e]ffective self-regulation is the best system for promoting high standards in the media.”⁷

Together with the right to vote, realisation of the right to freedom of expression is one of the key means by which citizens can contribute to the discussion and formulation of public policy, and thus make democracy a reality. Given its central role as an enabler of democracy, freedom of expression should be subject only to limited and clearly defined exceptions, which are genuinely necessary to safeguard other important interests.

Permitting a wide margin of freedom of expression does have its costs. It requires the toleration of a good deal of nonsensical, unpleasant or provocative speech. In between what is clearly unlawful and what should clearly be permissible lies a grey zone of conduct whose propriety may be questioned, but which does not indisputably cross the line. Governments are often tempted to enter into this grey zone – sometimes spurred on by indignant citizens or competing media outlets – and regulate all expression which they regard as undesirable. Such extensive regulation risks having a chilling effect on legitimate speech, however, as what constitutes ethical and professional reporting does not lend itself to clear definition. Moreover, where governments are able to, the attraction of using expansive powers over the media for self-interested purposes often proves difficult to resist. James Madison, author of the First Amendment to the US Constitution, expressed these concerns as follows:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.⁸

⁶ See *supra* note 2.

⁷ Principle IX, *Declaration of Principles on Freedom of Expression in Africa*, African Commission on Human and Peoples’ Rights, 32nd Session, 17-23 October 2002, Banjul, The Gambia.

⁸ Quoted by the US Supreme Court in *Near v. Minnesota*, 283 U.S. 697, p. 718 (1931).

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What is ‘ethical’ or ‘professional’ is therefore best left to the appreciation of media and their readers and viewers, rather than established through binding measures. Ideally, journalists will take it upon themselves to establish a common understanding of the ethics of their profession through a self-regulatory code, enforced through peer pressure.

Self-regulation is not always successful, as the Kenyan experience shows. However, toleration of a certain amount of unethical and unprofessional reporting is still to be preferred over regulation which may come to stifle legitimate reporting.

We note that Article 34(5) of the Kenyan Constitution now requires the enactment of legislation which “provides for the establishment of a body, which shall [...] set media standards and regulate and monitor compliance with those standards”. The establishment of a statutory press council has therefore become a constitutional obligation. While this is regrettable, the risk this arrangement poses to press freedom will be reduced if proper effect is given to the remainder of Article 34(5), which states that the regulatory body shall:

- (a) be independent of control by government, political interests or commercial interests;
- (b) reflect the interests of all sections of the society.

3. ANALYSIS OF THE MEDIA BILL

In the following sections, we provide an analysis of the Media Bill, focusing in particular on the functions, independence and powers of the Media Council of Kenya.

3.1. Functions of the Council

Overview

The Council’s mandate is set out in Section 4, which lists a set of 12 discrete objectives in paragraphs (a) through (l). These include the following, briefly put:

- resolving disputes between the government and the media, the public and the media and between media amongst each other;
- the promotion of media freedom and the rights of journalists;
- the promotion of high professional and ethical standards amongst journalists;
- advising the government on professionalism and training of journalists;
- making recommendations on the employment criteria for journalists;
- upholding and maintaining the ethics and discipline of journalists;
- compiling and maintaining a register of journalists, media enterprises and any other registers the Council deems fit;
- conducting an annual review of the performance and the general public opinion of the media.

Analysis

The Media Bill does not entail any change in the mandate of the Council compared to what is currently foreseen under the Act.

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The most traditional function of a press regulatory body is to consider complaints from the public aggrieved by a story in the media or by the conduct of a journalist. Handling such complaints is indeed amongst the functions of the Council, and as will be seen in the discussion below, the Media Bill contains a range of provisions detailing the applicable procedure.

But as Section 4 makes clear, the Council's functions go far beyond handling complaints from the public. Without a doubt, the Council could fulfil a useful role in several of the other areas it is supposed to involve itself in. However, the Bill is almost completely silent on the objectives the Council is required to pursue in these areas, the kinds of activities it is expected to undertake, the powers it enjoys or the procedures it is required to follow.

For example, the promotion of media freedom is surely a worthy objective, but it is entirely unclear how the Council would be expected or permitted to do this. Is it supposed to issue advice to the government on media legislation? Could it launch an investigation into harassment of a journalist? Does it have the authority to recommend anti-trust measures to break up a media monopoly?

Similarly, it is not clear what "making recommendations on the employment criteria for journalists" means. This might imply that the Council should act as a kind of trade union for journalists, pressuring their employers to provide better working conditions. Conversely, it could mean that the Council is supposed to encourage media companies to impose more stringent conditions for the selection of their staff. The latter interpretation would be problematic from the standpoint of international law, which does not regard the imposition of entry requirements for the practice of journalism as legitimate.⁹

An annual review of the 'performance' of the media and public appreciation of its work might make for an interesting read, but by what standard should the Council measure media 'performance' and what is the purpose of the exercise?

The Media Bill's vagueness admittedly has the advantage that the Council will enjoy freedom to set its own agenda and respond to emerging needs flexibly. However, this comes at the expense of considerable risks. The Council may be stifled by the breadth of its responsibilities and it may prove timid about taking action on any particular issue due to uncertainty over its mandate. If the Council does take action, its intervention may be dismissed, rightly or wrongly, as being beyond its remit. Most worryingly however, the Council is given minimal direction on whose interests it is supposed to promote. In light of Article 34(5)(b) of the Constitution, the Council should serve the interests of all sections of the society, but this is not reflected in the Bill. It would be advisable to provide the Council with proper guidance in this regard, as the interests of society at large do not always coincide with those of, for example, media companies or journalists. The example of the break-up of a media monopoly mentioned

⁹ The *Declaration of Principles on Freedom of Expression in Africa* (*supra* note 7), states in Principle X that "[t]he right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions." In the same vein, Principle 6 of the *Inter-American Declaration of Principles on Freedom of Expression* (approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000) states that: "Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression." For further discussion on this subject, see ARTICLE 19's analysis of the Media Council of Kenya Bill, 2006, note 2, p. 5.

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above illustrates the point. Such a move may benefit the public's right to know even if it is an interference in the freedom of the media sector.

The Council's power to compile a register of journalists is a matter of potential concern. As mentioned above, entry requirements for the practice of journalism are generally not considered legitimate in international law, as the right to communicate through the media is an essential facet of the right to freedom of expression, which is enjoyed by "everyone" (see, for example, Article 19 of the *Universal Declaration of Human Rights* and Article 33(1) of the Kenyan Constitution). In many democracies, even the establishment of a general definition of who is a 'journalist' is considered anathema because defining the profession implies drawing a distinction between those who belong to it and those who do not.

It appears the Council's authority to establish a register of journalists is not intended as a licensing power but has a more mundane purpose, namely the levying of registration fees on media practitioners to finance its own operations, as foreseen in Section 20. While less problematic than a scheme to regulate access to the profession, the registration fee is a cause for concern in its own right; as there are no stated constraints on its height and the definition of 'journalist' in Section 2 is arbitrary and vague. Any "person with a diploma or a degree in mass communication from a recognised institution of higher learning" may be considered a journalist, regardless of whether the person is factually working in the field. Persons who collect, write, edit and present news articles on the internet are also liable to be considered journalists, meaning that those who post the occasional blog article may also be liable to pay the levy.

In view of the practical difficulties of fairly defining and taxing 'journalists', consideration should be given to abandoning the levy on them. At a minimum, however, the height of the annual levy should be capped at a level which does not discourage entry into the profession, and a new provision should place beyond doubt that the Council shall not have the power to impose any precondition on the practice of journalism except as expressly provided for in the Act.

Recommendations:

- Consideration should be given to narrowing the Council's mandate and making it more focused.
- The Media Bill should provide more guidance to the Council on how it is to perform its functions other than handling complaints. In particular, the Bill should clarify what types of activities the Council is expected and permitted to undertake and where necessary the procedures it is required to follow.
- In line with Article 34(5)(b) of the Constitution, the Media Bill should contain a provision requiring the Council to perform its functions in the interests of all sections of the society.
- Consideration should be given to scrapping the Council's power to compile a register of journalists from Section 4(k) as well as removing the power to impose a levy on them from Section 20.
- At a minimum, the Media Bill should cap the height of the levy the Council may impose at a level which does not discourage entry into the profession of journalism; the definition of 'journalist' for these purposes should be reviewed to exclude those not engaged in a regular and professional manner in the

dissemination of information to the public via the media.

3.2. Independence of the Council

One of the key implications of the right to freedom of expression is that regulatory powers over the media should be entrusted only to bodies which are independent, in the sense that they are protected against political or commercial interference. This basic principle has been endorsed by several international bodies, often in relation specifically to broadcast regulatory bodies, since statutory regulation of the press is discouraged. The *Declaration of Principles on Freedom of Expression in Africa*¹⁰ states at Principle VII(1):

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

Similarly, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media – noted in a Joint Declaration adopted in 2003:

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.¹¹

Consistently with this principle, the 2010 Constitution requires that the Council “be independent of control by government, political interests or commercial interests”.¹²

To safeguarding the independence of a media regulatory body such as the Council in practice, the following will be particularly relevant:

- A legislative guarantee of the body’s independence;
- Rules relating to appointment and membership which prevent ‘capture’ by political or commercial interests;
- Accountability to another independent or democratically legitimated body;
- Funding arrangements which insulate the body from pressure.

These aspects are considered in the following sections.

3.2.1. Legislative guarantee of independence

Overview

A guarantee of the Council’s independence is found in Section 5 of the Media Bill, which states:

¹⁰ See note 7.

¹¹ Adopted 18 December 2003. Available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

¹² Article 34(5)(a).

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The Council shall operate without any government, political, commercial or other bias or interference and shall be wholly independent and separate from the government, any political party or organization, any commercial enterprise or enterprises or any nominating authority.

Analysis

Compared to the current wording in the Media Act, 2007, the Media Bill introduces a new guarantee and requirement that the Council will be independent and free of interference from commercial enterprises. This addresses an important lacuna in the existing text and commendably brings Section 5 in line with the Constitution as well as with international standards.

3.2.2. Membership and appointment process

Overview

The Council will consist of seven members (Section 6), including one chairperson (Section 7(2)), who are appointed by the Chief Justice (Section 8(6)).

To be eligible for appointment to the Council, a person must meet a detailed range of requirements set out in Sections 7 and 10, which to some extent overlap and duplicate each other.

The person must be a Kenyan citizen with a degree from a recognised university (Section 7(1)), or at least from a recognised institution of learning (Section 10(1)(a)). He or she must have a distinguished career and at least ten years' experience in a relevant field, including past or present membership in a professional body (Section 7(c) and (e)). Relevant fields according to Section 7(1)(c) are law, journalism, finance, gender and human rights, performing arts and advertising. Section 10 restates this list in similar terms, adding entertainment and education. Furthermore, the person must meet the requirements of Chapter Six of the Constitution – which outlines the integrity and dignity expected of a holder of public office (Section 7(d) – and must be committed to media freedom, responsible journalism and the right of the public to be informed (Section 10(1)(b)). Finally, candidates for the position of chairperson must be qualified to hold the position of judge of the High Court under the Constitution, which in practice means the chairperson must be a lawyer with a career of at least 10 years in the legal field.

In addition to required qualifications, there are also a number of disqualifying circumstances, set out in Section 9. Holders of various public offices, persons in the public service and employees and officers of political parties and organisations are not eligible for appointment. The same applies to employees of media enterprises or persons who are otherwise likely to face a conflict of interest. Finally, undischarged bankrupts, persons convicted to more than 1 year imprisonment and persons not habitually resident in Kenya are likewise ineligible for a position on the Council.

Section 8 deals with the appointment process. When a vacancy arises, the Chief Justice invites nominations by a notice in the Gazette published within two weeks. Eligible candidates can either put their own name forward, or may be nominated by any person, organisation or group of persons. A nomination must be made within two weeks of the notice to the Judicial Service Commission, which at the expiry of this deadline publishes a list of the candidates in the Gazette.

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The Judicial Service Commission then assembles an interview committee consisting of its own members, as well as one representative of the Media Owners Association; the Kenya Union of Journalists; the Ministry of Justice, National Cohesion and Constitutional Affairs; the State Law Office; and the Editors Guild of Kenya. This committee convenes and, as long as a “stated quorum” is present, proceeds to select 3 candidates for the position of chairperson and 9 candidates for ordinary membership from amongst the nominees. This shortlist is forwarded to the Chief Justice who, within fourteen days, takes a final decision on the appointees.

The appointments are then announced in the Gazette (Section 9(2)) and the appointees take an oath or make an affirmation of their commitment to freedom of expression and the media, responsible journalism, the right of the public to be informed and the national values under Chapter 6 of the Constitution (Section 10(2)).

Members of the Council hold office for three years and may be reappointed once (Section 10). Membership of the Council may be lost under a number of circumstances, such as death or prolonged incapacitation by mental or physical illness; resignation; absence without good cause from three consecutive meetings; or conviction of a serious offence including fraud, forgery or corruption. In addition, a member may be removed if s/he is “unable or unfit to discharge” his or her responsibilities.

Analysis

The composition of the Council is the area where the Media Bill proposes the most marked changes compared to the Act currently in force. On the whole, the amendments are positive but a number of issues remain to be a concern for ARTICLE 19.

Presently, the Council has 13 members, an unnecessarily large and unwieldy number. Nine members the Council can be sufficiently representative and knowledgeable while also sufficiently nimble.

As noted above, Sections 7 and 10, which set out eligibility requirements, largely overlap each other. They are also to some extent contradictory. Our impression is that this is an oversight and Section 7 is intended to replace, rather than supplement Section 10. In any event, the eligibility requirements should be consolidated into one provision for better readability and clarity.

The requirements for appointment justifiably seek to ensure that adequate and relevant expertise in different areas is present on the Council. At the same time, the strictness of these requirements risks reserving Council membership to a small elite of media and legal professionals who may well have a similar outlook, when its purpose is to serve the interests of the wider public. Inclusion of a number of lay persons or professionals from unrelated fields could add valuable viewpoints to the Council’s deliberations. Accordingly, we recommend relaxing the strict requirement 10 years’ experience in a relevant field, and instead requiring the interview committee and Chief Justice to ensure that the Council appointed is broadly representative of the public, while also including sufficient expertise in different relevant fields amongst its ranks. In the same vein, we fail to see why the chairperson of the Council would need to be a lawyer in all cases.

Further on the subject of representativeness, the existing Act seeks to ensure a minimum degree of gender balance on the Council, and this positive aspect is unfortunately lost in the

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Media Bill. We recommend reintroducing this, for example by stipulating that at least three or four of the Council's members shall be of opposite gender (this recommendation is to be seen in the light of our proposal to reduce a number of the Council members).

The requirement under Section 7(1)(d) for candidates to "meet the requirements of Chapter Six of the Constitution" is problematical as Chapter 6, while setting out very valuable principles, is too broad and general to be used as a specific eligibility criterion. Here the wording of Section 10(b) is to be preferred: candidates should be "committed to" the values of Chapter 6. Whether this is the case will then have to be judged by the interview committee based on a candidate's track record and response to pertinent questions.

The 'rules of incompatibility' of Section 9 are broadly sensible, disqualifying persons who are too closely connected to government or media companies from serving on the Council. An apparent omission here is persons who, while not being employed in the media, have a substantial direct or indirect financial interest in one or more media companies. Such persons do fall under the residual provisions disqualifying anyone "likely to have a conflict of interest", but for the avoidance of any doubt should be explicitly ruled ineligible.

The proposed appointments process is a clear improvement compared to the existing Act, which allows a number of organisations such as the Kenya Union of Journalists, Media Owners Association and Law Society of Kenya to appoint one, two or three persons to the Council, without there being any independent control on the appropriateness of their candidates. The proposed open nominations process whereby anyone with a suitable background may be a candidate, and the responsibility to make a choice is shared between various entities, is far more accountable and transparent. The presence of a representative of the Ministry of Justice, National Cohesion and Constitutional Affairs on the interviewing committee is a strange choice in view of the requirement of strict independence from the government, although this person will hold only one vote amongst several. His or her presence could become a greater issue if other members fail to turn up; it is not clear what the 'stated quorum' is, whose presence is necessary for decision-making.

We fear that publication of vacancies in the Gazette – surely not the country's most widely read publication – in combination with a very short timeline for applying will prevent suitable candidates from applying in a timely way. Vacancies on the Council should be announced in mainstream media and at least three weeks should be allowed for applications. We also believe the transparency of the selection process could be further enhanced if the interviews with candidates were conducted in public.

The three-year term of Council members is rather short, particularly considering the effort that will go into appointing them, unless the assumption is that terms will normally be renewed when they expire. More cause for concern, however, are the grounds for removal of a Council member, for a number of reasons.

First, it is unclear who would have the power to remove a member if one of the grounds mentioned in Section 11 occurs. Normally the power to remove would vest in the party which made the appointment, *i.e.* the Chief Justice. Removal by the Chief Justice is problematic, however, because a member seeking judicial review of a dismissal might ultimately end up before the very same judge. Therefore, this power is perhaps better entrusted to the Judicial Service Commission.

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The second reason for concern is that an obvious ground for removal is missing: if a person ceases to meet the requirements to be eligible for appointment – for example by taking up a government post – that person should also be removed from the Council.

Thirdly, some grounds for removal are quite vague and could be used in an arbitrary manner. This is true in particular of Section 11(1)(f), which applies where a member is “unable or unfit to discharge the functions of a member of the Council”. We are uncertain what this adds, legitimately, to “incapacitation by mental or physical illness” and propose to simply delete this ground. In addition, a decision to dismiss a member should be explicitly subject to judicial review.

Finally, we note that the numbering of certain sections is erroneous. For example, there are two Sections 8(6), as well as two Sections 10.

Recommendations:

- The criteria for eligibility to serve on the Council should be consolidated into one provision.
- Possessing ten years of experience in a relevant field should not be a requirement for membership of the Council. Rather, the interview committee and Chief Justice should be required to ensure that the Council they appointed is both broadly representative of the public and includes sufficient expertise in relevant fields.
- The requirement for the Chairperson to be qualified to hold the position of judge of the High Court should be removed.
- The Media Bill should ensure sufficient gender balance on the Council, for example by requiring that three or four of its nine members should be of opposite gender.
- Candidates should be required to be “committed to” the values of Chapter 6 rather than “meeting” these requirements.
- Persons who hold a substantial direct or indirect financial interest in one or more media companies should be explicitly ineligible to serve on the Council.
- No representative of the Ministry of Justice, National Cohesion and Constitutional Affairs should be involved in the process of selecting Council members.
- Vacancies on the Council should be announced in mainstream media as well as the Gazette, and at least 3 weeks should be allowed for applications.
- The Bill should clarify who has the power to remove a member of the Council if one of the grounds mentioned in Section 11 occurs. Consideration should be given to entrusting this responsibility to the Judicial Service Commission.
- Loss of eligibility for appointment to the Council should be added as an additional ground to remove a member.
- ‘Inability or unfitness’ to discharge the functions of a member of the Council is too vague a criterion and should not be a separate ground for removal.
- Any decision to remove a member of the Council should be subject to judicial review.
- The numbering of the Bill’s sections should be corrected.

3.2.3. Accountability to the public

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Overview

Section 23 of the Media Bill obliges the Council to keep proper books and records of accounts. Within three months of the end of each financial year, the Council's accounts must be submitted to independent auditors, together with a statement of income and expenditure and a statement of assets and liabilities. The audited accounts must subsequently be published in at least two national daily newspapers.

Analysis

As the Bill rightly acknowledges, independent regulation does not mean that the regulator should not be accountable to the public. The mandatory publication of audited accounts is a positive measure in this regard. Consideration should further be given to requiring the Council to publish an annual report to the public, describing its objectives for the past year, whether they were met, and which activities were undertaken.

Recommendations:

- The Council should be required to publish an annual report explaining its objectives and activities over the past year to the public.

3.2.4. Funding arrangements

Overview

The sources of funding which the Council may draw on are found in Section 19 of the Media Bill. The Council may generate income directly by imposing a levy on media enterprises and journalists. It may also invest its assets and produce a return in that manner. Furthermore, the Council may receive funds from the National Assembly or from lawful private organisations or individuals. The Council may not, however, accept money from foreign sources.

Analysis

As the old saying holds, "he who pays the piper calls the tune", and the manner in which a media regulatory body is funded is key to its independence. Provided the media are not excessively concentrated, a direct levy on media companies is a good source of funding which entails limited risks to the regulator's independence. Of course, the levy should be set at a reasonable level which does not undermine media companies, as this would defeat the objective of raising standards. A levy on journalists is more problematic given the difficulties and risks of defining who is a 'journalist', as discussed previously in Section 3.1.

Notably absent from the Media Bill is any prohibition on the Council receiving donations or grants, directly or indirectly, from media companies or their owners or employees. Given the constitutional requirement of independence from commercial interests, such a provision is indispensable, and its absence is all the more notable when contrasted with the rigorous ban on any foreign sources of funding. One can donations from foreign organisations (such as UNESCO or a charitable trust) which would be far less compromising to the Council's independence than a grant from a Kenyan media company.

Recommendations:

- The Council’s power to impose a levy on media companies should be subject to a requirement that the levy may not be set at such a level as to compromise their ability to engage in quality journalism.
- The Council should be prohibited from receiving donations or grants, directly or indirectly, from media companies, their owners and employees.
- Consideration should be given to relaxing the ban on foreign sources of funding insofar as these pose no credible threat to the Council’s independence.

3.3. Complaints and dispute resolution

Overview

Part IV of the Media Bill deals with one of the key functions of the Council – the resolution of disputes concerning the media.

In fact, as Section 24 makes clear, disputes are not dealt with by the Council itself, but by a five-member Complaints Commission recruited externally by the Council. Four of its members must possess experience and expertise in a relevant field (this encompasses roughly the same fields from which Council members themselves are to be drawn), while the fifth, the chairperson, must be a current or past holder of judicial office or an advocate of the High Court with at least ten year’s standing. The Complaints Commission may in turn form conciliation, arbitration and mediation panels from amongst its own members (Section 25).

Section 27 establishes that two types of complaints may be filed. The first is a complaint against a media outlet, company or journalist, or against the Council. In the normal case this would probably be an allegation by a citizen that a particular story or journalist violated the code of ethics. The second is a complaint about an unlawful interference in the right of freedom of expression of a journalist or media outlet by anyone. Such a complaint could for example be directed at a public official or authority, or perhaps at a media outlet, if a journalist was unhappy at working conditions or the level of editorial freedom.

The procedure for considering complaints is relatively straightforward. The Complaints Commission will initially require the defendant to present a written response (Section 28(1)). While this is not expressly stated, it appears from certain provisions that the Commission may also conduct hearings: Section 28(4) provides that hearings are held in public unless either party objects, while Section 30(2) states that the Commission takes its decision “after hearing the parties”. The Commission may compel anyone to provide reasonable assistance to its investigations, including by appearing before the Commission (Section 29(1)). It is not bound by the rules of evidence of the Evidence Act (Section 29(2)).

Having considered the complaint, the Complaints Commission may take three forms of action, or a combination thereof. It may dismiss the complaint as lacking in merit; it may issue a public reprimand of the journalist or media outlet involved (though, peculiarly, not of any other party against which a complaint may be addressed); or it may order the offending party to publish an apology and correction (Section 30). A decision of the Commission may be appealed to the Council within 14 days (Section 33). The Bill does not prescribe any particular procedure if the original complaint was directed at the Council. However, further

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appeals against the Council decision are possible to the High Court, though only on points of law (Section 33(3)).

Section 32 states that decisions of the Complaints Commission and Council shall be published in the Gazette, apparently contradicting Section 28(2) which stipulates that the Commission shall publish its findings only “if it considers it in the public interest to do so”.

Failure to comply with a decision of the Complaints Commission is a criminal offence which carries a fine of up to 50,000 shillings and/or a prison term not exceeding three months. Obstructing or hindering the Commission, knowingly making false or misleading statements to it or furnishing it with false information are also offences carrying the same penalties. In the case of a continuous offence, the fine is calculated as 1,000 shillings for each day it continues (Section 38).

Other breaches of the Act or the regulations made thereunder are punishable with a fine of up to 200,000 shillings or six months’ imprisonment (Section 39).

Analysis

Overall, subject to our reservations about the principle of binding regulation of journalistic ethics, the dispute resolution provisions of Part IV are reasonable. A number of issues do require further attention.

It is not evident to us why there would need to be a Complaints Commission separate from the Council, which itself has members with the right competence to consider complaints. If finances are a concern, consideration could be given to appointing the Complaints Commission from amongst the Council’s own members.

An issue which the Media Bill does not address is the relationship between the Council and Complaints Commission on the one hand, and the Independent Communications Commission of Kenya on the other. We note that the Communications Act entitles persons who are aggrieved by a radio or TV programme to complain within 30 days to that broadcaster, and if necessary to subsequently escalate the matter to the Communications Commission. The risk of parallel litigation could be partly addressed by stipulating in the Media Bill that a matter which is being or has been considered by the Communications Commission can not be brought before the Complaints Commission.

The idea that the Complaints Commission may receive not only complaints against journalists and media, but also from them, is a positive one. In practice, however, the procedure as set out in Part IV seems to be set up with only the former type of complaint in mind. This is most evident in Section 30 which deals with the sanctions the Commission may impose if the complaint is well-founded. As noted, reprimands may be issued only against a journalist or media enterprise. If the complaint is brought by a journalists or media enterprise and concerns a failure to respect freedom of expression, the defendant in many cases may be a public official rather than a colleague or competitor.

Given that the Complaints Commission can issue binding decisions, it should be explicitly required to conduct hearings in every case, unless the parties agree to dispense with the hearing. Furthermore, we are particularly concerned that appeals to the High Court against a Council decision may be made only on points of law. Although the Council does not have the power to impose fines or jail sentences, compelling a journalist or media outlet to apologise is

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still a fairly significant interference in freedom of opinion, conscience and expression. The European Court of Human Rights has even tended towards prohibiting this remedy, stating that “to make someone retract his or her own opinion by acknowledging his or her own wrongness is a doubtful form of redress and does not appear to be ‘necessary [in a democratic society]’.”¹³ ARTICLE 19 considers an order to make an apology appropriate in some cases, but to entrust the power to issue such an order to a non-judicial body not bound by normal rules of evidence, without the right to a fulsome appeal which considers the factual record as well as points of law, is problematical.

With regard to the contradiction between Sections 32 and 28(2), we recommend resolving it in favour of the former provision and requiring all decisions of the Complaints Commission and Council to be published in the Gazette, in conformity with the open justice principle and the right to a public trial. In sensitive cases, names of persons could be anonymised as appropriate.

Finally, the residual penal provision in Section 39, which allows persons to be punished for breaches of the Act or regulations made under it for which no sanction is expressly provided is problematic, as the implications of this provision are highly unclear. Should, for example, a failure of the Council to conduct an annual survey of public opinion of the media, or a failure of the Chief Justice to observe the tight deadlines in the appointments process for Council Members really attract criminal liability?

Recommendations:

- Consideration should be given to selecting the Complaints Commission from amongst the Council’s own members, rather than recruiting and remunerating an additional five persons.
- The risk of parallel litigation on the same issue before the Independent Communications Commission of Kenya and the Complaints Commission should be addressed.
- The power to issue reprimands under Section 30 should not be limited to reprimands of journalists and media enterprises.
- Appeals to the High Court against a Council decision on a complaint should not be limited to points of law.
- All Complaints Commission and Council decisions should be published in the Gazette. Names of persons can be anonymised where appropriate.
- The residual penal provision in Section 39 should be removed.

3.4. The Code of Conduct for the Practice of Journalism

Overview

Section 36(1) of the Media Bill requires the media to:

...in a free and independent manner and style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity violence and ethnic biases.

¹³ *Kazakov v. Russia*, Judgment of 18 December 2008, Application no. 1758/02, para. 30.

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Analysis

The above provisions are clearly proper objectives for a media outlet to set itself, but far too vague and unspecific to be enforced as a requirement. Section 36(3) offers some reassurance in this regard, stating that the Council, “[S]ubject to subsection (2) ... shall not seek to control or direct journalists in the execution of their professional duties”. Subsection (2) does not in fact provide any powers to the Council to control or direct journalists, stating merely that:

The media shall keep and maintain high professional and ethical standards and shall, at all times, have due regard to the Code of Conduct set out in the Second Schedule to this Act.

Thus, while we suspect that the Code of Conduct is the standard by which the Complaints Commission and the Council will judge complaints against journalists and media, this is not stated explicitly and the Code is mentioned only as a guideline entitled to “due regard”.

It is beyond the scope of this Memorandum to provide a complete analysis the Code of Conduct. We limit ourselves to a few general comments.

In most areas, the Code is in line with international standards. It appears to borrow substantially from the British Editors' Code of Practice, a self-regulatory code which has been continually refined since its original publication in 1991 and may be regarded as an example of good practice.

Back to the Kenyan Code, it commences by asserting that:

The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.

This statement attracts several criticisms. Fairness, accuracy and the absence of bias are important objectives for journalists who produce news stories for universal consumption. However, it is perfectly legitimate for journalists and media outlets to target a particular audience and present information from a certain political, ideological, religious or other point of view, to comment on and satirise facts and developments or even to exaggerate certain matters. The goal of ensuring a well-informed and critical public is better served by diverse media representing a range of different viewpoints and styles, than if all newspapers and broadcasters serve up the same ‘neutral’ fare, for fear of being convicted of bias or lack of balance.

Second, an obligation to obtain comment from anyone who is mentioned in an unfavourable context is unwarranted. While requesting such comment can contribute to a more balanced story, in many contexts it is not a reasonable requirement. To name two examples, a news report that a particular person is facing trial for an offence should not have to include a comment from the defendant. And programme on consumer affairs which presents a product ranking should not need to include a reaction of the producers whose products receive lower marks. A far more sensible rule is found in Section 5, which states that an opportunity to reply should be given “when reasonably called for”.

Third, and more generally, we do not believe a code of ethics has any business seeking to define the “fundamental objective” of journalism. Individuals may have different reasons to wish to exercise their freedom of expression by becoming journalists. The object of a code

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should not be to constrain motives, but to ensure that the exercise of freedom of expression is not unduly detrimental to others.

The unhelpful preoccupation with rooting out “bias” is evident in several places in Section 1. In addition to avoidance of bias being termed a “fundamental objective” in subsection (a), subsection (h) states that journalists should “inform the public without bias”. Subsection (i) adds that they “should present analytical reporting based on professional perspective, not personal bias.” A much more sensible approach is found in Section 1(d), which states that “[j]ournalists, while free to be partisan, should distinguish clearly in their reports between comment, conjecture and fact.”

The requirement in Sections 1(e) and 11(b) to avoid “provocative or alarming headlines” as well as headlines which do not reflect the article they introduce is a further unjustified intrusion into editorial freedom. In this context it is worth quoting a statement frequently repeated by the European Court of Human Rights:

[Freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".¹⁴

It may be added that the right to freedom of expression would become quite illusory if it applied only to statements which are uncontroversial to start with. How to introduce the contents of an article in its headline is the exercise of editorial judgment, and this should not be interfered with absent a specific justification.

Recommendations:

- Section 36 of the Media Bill should state clearly that whether a complaint against a journalist or media company is well-founded will be judged according to the Code of Conduct set out in the Second Schedule to the Act.
- The Code of Conduct should not seek to define the “fundamental objective” of journalism, require all sides of each story to be reported or require comment to be obtained from any person mentioned in an unfavourable context. Section 1(a) should be deleted.
- Requirements for journalists to avoid “bias” should be deleted from Sections 1(h) and (i). The applicable rule should be that stated in Section 1(d), that while partisan reporting is permitted, comment, conjecture and fact should be clearly distinguished.
- Sections 1(e) and 11(b), prohibiting “provocative or alarming” headings and requiring headings to reflect the article they introduce, should be deleted.

¹⁴ See, for example, *Handyside v. United Kingdom*, judgment of 7 December 1976, Application no. 5493/72, para. 49.