NOTE

on the

Draft Broadcasting Authority Act for Dominica

ARTICLE 19
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This Note provides an analysis of the draft Broadcasting Authority Act for the Commonwealth of Dominica (draft Act). Although the title refers to a broadcasting authority, the draft Act is a general broadcasting law. The draft analysed in this Note is dated 2007.[1] The Organisation of Eastern Caribbean States (OECS) has for some time been involved in developing broadcasting legislation and the draft Act is part of that process.

This Note assesses the draft Act against international standards on freedom of expression as relevant to the issue of broadcasting. The draft Act has a number of positive features but, at the same time, ARTICLE 19 has a number of concerns with the draft Act, as outlined below.

ARTICLE 19 generally welcomes moves to put broadcast regulation in Dominica on a more firm legal footing. In many Caribbean countries, broadcast regulation is undertaken by telecommunications regulators. In Dominica, for example it is undertaken by the National Telecommunications Regulatory Commission. Although this approach has to some extent helped prevent extensive political interference in broadcasting, at the same time the rules are not carefully tailored to broadcast regulatory needs and, in particular, the need to ensure pluralism and the overall public interest in broadcasting. We recognise that there is a risk, in adopting new broadcasting legislation, of increased government interference in the sector.

[1] It is stamped as having been received by the Ministry of Community Development, Gender Affairs and Information on 28 February 2007.

However, we believe that the best way forward is to put in place a new legal framework for broadcasting, albeit one that is consistent with international standards and, in particular, that ensures that regulatory powers are vested in an independent body.

Dominica acceded to the *International Covenant on Civil and Political Rights* on 17 June 1993.[2] As such, it has committed itself to the legally binding obligation "to take the necessary steps … to adopt such laws or other measures as may be necessary to give effect to" the right to freedom of expression."[3] Freedom of expression includes the right to "impart information and ideas of all kinds … through any … media"[4] and, although this right is not absolute, any restrictions on it must be strictly "necessary" for the achievement of one of the legitimate aims listed in Article 19 of the ICCPR. Under international law, this establishes a high legitimacy threshold to be overcome before any restriction may be deemed to be justified.

1. Independence

A key issue in broadcast regulation is ensuring that any specific regulatory powers are exercised by a body that is independent in the sense of being protected against political or commercial interference. The draft Act sets up a new body – the Broadcasting Authority – with certain regulatory powers in relation to broadcasting. However, key powers in relation to both licensing and content are vested not in the Authority but in the Minister, a highly political figure. Furthermore, the Authority lacks structural guarantees of independence and, indeed, is clearly not intended to be independent.

A key problem is that the Minister, and not the Authority, has final say over whether or not to licence a broadcaster (see sections 25(4) and 28(3) of the draft Act).[5] It is also the Minister, and not the Authority, who decides:

- what conditions to impose on licensees (section 28(2));
- whether to accept proposed changes to a licence (sections 26(1) and 34), although variance of the terms and conditions would appear to depend on a positive recommendation of the Board;
- whether a licensee may transfer the licence (section 33); and
- whether or not to terminate or suspend a licence, including for failing to comply with any code adopted under the law, or for the vague reason that this in the public interest (sections 35(4) and 36(1)).

These powers are fundamentally at odds with international law, which requires that any bodies which exercise powers in relation to regulation of the media should be independent of Government, a condition which the Minister clearly does not meet.

Even though its powers are limited, the independence of the Authority is not protected in the draft Act. Indeed, it would appear that this was never the intention. The only reference in the draft Act to the idea of independence is in paragraph 16 of the Fifth Schedule, and this

[2] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.
[3] Article 2(2).
[4] Article 19(2).
[5] The Minister must give reasons where he or she decides not to grant a licence recommended by the Board. Given the very broad grounds for refusing to grant a licence, however, this is not much of a fetter on the Minister's discretion.

appears to be an oversight.[6] Pursuant to section 5(4), the Authority is accountable to the Minister, rather than to Parliament, as is the case in better practice broadcasting systems. The Minister also has broad powers to issue directions to the Board of the Authority regarding policy matters affecting national security, public order and safety, and the Board must comply with those directions (section 5(5)).

The Second Schedule provides for the appointment by the President of the seven members of the Board of the Authority, nominated, respectively, by the Prime Minister, the Leader of the Opposition, the Minister responsible for Community Development, the Minister responsible for Communications, the Media Association, the Dominica Bar Association and the Carib Chief. The President also appoints the Chair (paragraphs 1(1) and (2)). As a result, three of the seven members of the Board are appointed by Government Ministers. This gives the Government considerable control over the actions of the Authority, and seriously undermines its independence. A better approach would be for none of the members to be nominated or appointed by political figures and for appointments to be made instead by Parliament, a multi-party body. It is also good practice for members of the public to be given an opportunity to comment on the appropriateness of a proposed shortlist of candidates for membership, before they are formally appointed. Finally, it would enhance independence if the members appointed their own chair, rather than this being done by the President.

Pursuant to paragraph 2 of the Second Schedule, Members of Parliament may not be appointed to the Board of the Authority, along with anyone who holds or becomes interested in any share or stock of a licensee or who has any pecuniary or other material interest in any device or machine used by a licensee. Where a member acquires such an interest, he or she must resign membership of the Board.

These rules are both not strict enough and too strict. It is important to prevent all individuals with strong political connections from being appointed as members, not just Members of Parliament. Individuals who hold senior posts in political parties should, for example, also be excluded. At the same time, it is not legitimate to exclude everyone from membership who holds even a minor interest in a licensee and it is certainly unnecessary to exclude anyone who has any interest in a device or machine which is used by a licensee. Rather, only individuals who have significant interests in broadcasting should be excluded. Finally, rather than requiring individuals who have conflicting interests to resign, they should be given the opportunity to divest themselves of such interests.

Paragraph 2 of the Second Schedule sets tenure at three years, subject to reappointment. Three years is too short for purposes of protecting the independence of members – five years would be more reasonable – and better practice laws limit the possibility of reappointment to one further term. Membership may be terminated by the President, among other things for being deemed incapable of carrying out the functions of office. In terminating a member, the President may, but is not required to, consult with whomever recommended that member for appointment. There should be stronger protection for tenure. As with appointments, it should be the Parliament, not the President, which has the power to remove a member.

[6] The Fifth Schedule seems to have been slotted in from another law(s) and does not appear to have been properly adapted to the draft Act or integrated into it. It refers, for example, to matters already dealt with in other parts of the draft Act, such as the submission by licensees of information to the Authority and to fees for licences.

The Minister also has extensive powers in relation to other key bodies established pursuant to the draft Act. Although it is the Board that appoints the Standards Committee (see section 40), the Minister appoints the members and chair of the more powerful Complaints Committee (section 41(3)), which has the power to order licensees to broadcast a correction and/or apology (section 42). The Complaints Committee should either be appointed by the Board or by Parliament.

The draft Act also provides for an Appeals Tribunal, which has the power to hear appeals from decisions of the Minister, Board and Complaints Committee (section 53). The President appoints and removes, apparently in his or her sole discretion, the members of the Appeals Tribunal, including the Chair and Deputy Chair (paragraphs 1 and 3(3) of the Fourth Schedule). The Minister has the power to appoint an alternate should any member of the Tribunal be unavailable (paragraph 2 of the Fourth Schedule), and also to set the remuneration and allowances of members (paragraph 8 of the Fourth Schedule). All of these powers should be insulated from political interference, for example by allocating them to Parliament.

Recommendations:

- Political figures, including the Minister, should not exercise regulatory powers over the media. The draft Act should instead vest regulatory powers in the Authority.
- The draft Act should include a clear statement of the independence of the Authority either in the main body of the text or in the Second Schedule, which provides for appointment of the members of the Board.
- The Authority should be accountable to the people of Dominica through the Parliament, and not to the Minister.
- The Minister should not have the power to give direct instructions to the Authority.
- The process of appointing members to the Board of the Authority should be substantially revised so as to enhance its independence. Appointments should be made by Parliament, not the President, Government Ministers should not have the power of nomination, the process should allow for civil society input, and the members should appoint their own chair.
- The rules on disqualification should be amended to prohibit anyone with strong political connections from being appointed as a member of the Board and to relax the rules on financial or business conflicts of interest.
- The tenure of Board members should be increased, for example, to five years, and eligibility for reappointment reduced to one further term.
- Parliament, not the President, should have the power to remove members and the grounds for removal should be clearly and narrowly drawn.
- The powers of the President and Minister over appointments to the Complaints Committee and the Appeals Tribunal should be removed and a process of appointments put in place that guarantees the independence of these bodies.

2. Licensing

A key concern with the licensing system is that, due to the wide definition of broadcasting contained in section 2(1), it would appear to include the transmission of radio or video material over the Internet. Given the wide range of possibilities for such transmission, including, for example, for home videos, this is neither practical nor legitimate. International

standards make it clear that licensing may only be legitimate as necessary in the context of limited resource constraints, which apply to the radio-frequency spectrum but not to the Internet.

The draft Act contains a number of absolute prohibitions on obtaining a licence. Pursuant to section 24(8)(c), no one who has been found liable for sedition or defamation, among others, may be granted a licence.

These prohibitions on granting a broadcasting licence are legitimate. Sedition is an offence that is widely discredited in democracies as being wide open to abuse on political grounds. It should not serve as the basis for a conviction at all, let alone used to justify refusals to issue a broadcasting licence. The mere fact of having once been found liable for defamation is hardly sufficient reason to impose a blanket ban on obtaining a broadcasting licence.

The draft Act refers to a wide range of considerations to be taken into account when assessing a licence application. Pursuant to section 5(6), the Board shall advert to matters of national security, public order and safety, as directed by the Minister. Pursuant to section 25(1), the Board shall consider a number of factors, including ability to comply with the Code and other licence conditions, effect on overall competition and management experience. Section 25(2) requires the Board to promote pluralism by giving priority to applicants which have independent editorial control. The Board shall also not recommend the grant of a licence where this is not in the public interest (section 24(8)(e)).

The Minister, for his or her part, is required, when deciding whether or not to grant a licence, to take into account the recommendations of the Board, the objective of promoting a diverse range of broadcasting services, the public interest and national security (section 30). The Minister may refuse to grant a licence where he or she is of the view that this might undermine the promotion of a diverse range of broadcasting services or impede the plural nature of Dominica culture (section 28(3)).

The various criteria outlined in the draft Act are largely in line with international standards in this area. At the same time, there are some problems. As noted, a political figure like the Minister should play no role in the allocation of licences. There is an undue focus on national security, public order and safety, which are most unlikely to be undermined by a broadcasting service and which should, where this happens, be addressed through the code of conduct or the criminal law.

The notion of the public interest is simply too vague a ground for refusing a licence. It could be used to justify almost any refusal and thus does not provide the clarity which is required in this area. Neither the Board nor the Minister should be able to rely on a vague reference to the public interest when refusing to grant a broadcasting licence. Instead, the law should set out clear grounds for assessing licence applications.

International law places an important emphasis on the idea of promoting a diversity of broadcasting services, including through licensing. However, the approach taken in the draft Act to this important objective is only partly in line with international standards. There is only a tenuous relationship between editorial independence and pluralism. It is unrealistic, and unproductive, to suggest that a broadcaster might undermine pluralism; rather, a broadcaster may fail to make a contribution to pluralism.

An approach to promoting pluralism in broadcasting which is more in line with international standards would start with the idea of ensuring the licensing of all three types of broadcasters: public service, commercial and community. This idea is referred to in paragraph 1(j) of the Fifth Schedule, but the draft Act simply does not operationlise this in concrete terms. Then, the Board should take into account in a positive way the contribution of a proposed broadcasting service to promoting pluralism when assessing an application, rather than the Minister determining whether the service would undermine pluralism.

Existing broadcasters are given six months to apply for a licence (section 27(2)). The draft Act is silent as to the question of licence renewals, apart from providing that the renewal application shall be lodged three months before the expiry of the old licence. It is well-established that there should be some sort of presumption of licence renewal, although this may be defeated where that is in the overall public interest. It is also not legitimate to put all existing broadcasters at risk of losing their licences after just six months. Instead, they should be deemed to have a regular licence, of five years duration (like all licences; see section 32(1)), perhaps subject to some of the conditions in the new law.

A number of provisions in the draft Act give either the Authority or the Minister undue discretion when it comes to broadcasting licences. Pursuant to section 8(1), the Board may issue any direction to a licensee, without any conditions, and the licensee is required to comply with that direction. The Board may also require a licensee to furnish it with any information it thinks is necessary, as opposed to information which it actually needs to undertake its functions. These provisions are not only excessively broad, but they also attract unduly harsh sanctions. Failure to comply with any direction of the Authority can attract a find of $200,000 (approximately US$75,000) and a recommendation for licence suspension (sections 8(2) and (3)).

Pursuant to section 28(2), the Minister has unfettered discretion to impose on a licensee such terms and conditions as he deems fit. The power to impose terms and conditions should be subject to requirements of relevance and need, with a view to promoting broadcasting policy. Section 29(1)(a) provides that broadcasters *may be required* to provide a right of reply. This should either be imposed on all broadcasters or on none (i.e. it should not be up to the authorities to decide on this on a case-by-case basis for different broadcasters).

Perhaps the most serious problem with the licensing regime is in relation to the rules for licence suspension or revocation. Section 35(1) sets out a number of matters which engage a disciplinary procedure, including that a licensee is operating in a manner that is detrimental to the public interest, that a licensee has contravened any code established under the law, or simply that it is in the public interest to do so. Where the Authority deems the matter to be less serious (a compliance issue), it shall give the licensee notice as to what must be done to rectify the matter and the time for doing so, and failure to comply may lead to licence suspension or revocation (sections 35(2) and (3)). Where the Authority deems the matter to be grave, it shall forward an application for licence suspension to the Minister who may suspend the licence for up to 30 days, renewal by court order, or order the Authority to treat the matter as a compliance issue (section 25(4)).

The Minister may revoke a licence entirely where, among others, the licensee fails, within 30 days, to rectify a problem which has resulted in a suspension, where the licensee is operating in a manner that is contrary to the public interest, or where the licensee is owned or controlled by someone who is not of sound mind, who is not solvent, or who is not ‘fit and proper’ (section 36(1)). It must, however, first suspend the licence (section 36(2)).

There are a number of very serious problems with this system, over and above the key problem that a political figure, the Minister, could suspend or revoke a broadcasting licence. It includes multiple references to the notion of the public interest, which as noted is simply too vague to serve as the basis for regulatory powers, particularly such serious and harsh ones as the suspension or revocation of a broadcasting licence. The idea of someone being 'fit and proper' is, likewise, an unacceptably vague term.

It is also highly problematical inasmuch as it focuses almost exclusively on licence suspension or revocation as a remedy, and fails to provide for a graduated system of remedies more carefully tailored to the various problems it seeks to redress. The system should allow for warnings for minor breaches of the rules or, in more serious cases, for the imposition of a requirement to carry a statement by the regulator identifying the breach. Only where these sanctions fail to remedy the problem should more serious sanctions, such as a fine, come into play. Licence suspension or revocation, the most serious sanction possible, should be applied only in cases of gross and repeated breach of the rules, which other sanctions have failed to redress.

Recommendations:

- The law should make it clear that dissemination of information over the Internet is not subject to licensing.
- The absolute prohibitions on individuals who have been found liable for sedition or defamation from obtaining a licence should be removed.
- Political figures like the Minister should play no role in the licensing process; this should be overseen entirely by the Authority.
- The references, as grounds for refusing to grant a licence, to national security, public order, safety and the public interest should be removed.
- The approach towards promoting diversity in broadcasting should be substantially revised. The law should provide for the licensing of three types of broadcasters, namely public service, commercial and community. The contribution of a proposed broadcasting service to pluralism should be taken into account in a positive way when recommending a licence, rather than the idea of a service undermining pluralism.
- Existing broadcasters should be given licences under the new law automatically, without having to apply for them within just six months.
- The law should include a non-binding presumption that a broadcast licence will be renewed, which may however be defeated where this is in the overall public interest.
- The Minister should not be able to impose terms or conditions on licensees and the ability of the Authority to do this should be allowed only where those terms or conditions further to overall goals of broadcasting, as set out in the broadcasting policy provided for in the law.
- The entire system for sanctioning broadcasters for breach of the law, particularly inasmuch as it relates to licence suspension and revocation, should be revised. The grounds for imposing sanctions should be clear, narrow, not include vague terms like 'the public interest' and 'fit and proper', and be linked to broadcasting policy. A proportionate and graduated system of sanctions should be put in place with warnings for most smaller breaches, followed by a requirement to carry a statement, and then fines only for more serious and repeated breaches, and licence suspension and revocation only in the most serious and extreme cases.

3. Content Rules

The draft Act provides for a number of potentially conflicting rules relating to broadcasting content. It provides for the Standards Committee to draw up a code to address a variety of broadcasting content issues, such as taste and decency and advertising, in consultation with other stakeholders, including all licensees (section 40). The Complaints Committee may then assess compliance with 'any Code prepared pursuant to' the law, and require those in breach of the rules to issue a correction or apology (section 42).

The Authority, for its part, may, after consultation with the Minister, but not necessarily with broadcasters or other stakeholders, make rules on a wide range of content issues, or any other programme standards it deems appropriate (section 54). It is also required to ensure that broadcasters do not incite to crime or offend public or religious feelings (section 7(d)(i)), that they carry such programmes as it deems necessary in the event of an emergency or disaster or to protect national security (section 7(j)), and that they carry out public service or development broadcasting (section 7(k)).

Finally, the Fifth Schedule calls for regulations, presumably to be adopted by the Minister, on a number of content issues, including the proportion of time to be devoted to Dominica programming, advertising and political programming. It also provides for the 'predominant use' (i.e. at least 50%) of Dominica resources in the production of content (paragraph 4(a)).

Breach of any rules described above, whether this be the Standards Committee's code or rules made by either the Authority or the Minister, could engage the process described above for licence suspension or revocation. Section 29(1)(a) provides for a right of reply to be afforded to anyone whose character, goodwill or reputation has been adversely affected by any programme.

The process by which the Standards Committee adopts a code, including through consultation with interested stakeholders and through the application of light sanctions for breach, conforms to international standards in this area. Rule-making by the Authority should also conform to these standards, including through a requirement to consult widely.

As with licences more generally, all of the rules relating to content should be implemented through a graduated regime of sanctions. It is particularly important in relation to content that the system not be punitive in nature – the civil and criminal law serves this purpose – but, rather, that it aim primarily at setting clear standards as to what is expected of broadcasters. This is important to guide broadcasters on how to navigate necessarily difficult and changing issues such as the appropriate level of violence on television or what children are comfortable viewing.

The 'must-carry' rules which the Authority is expected to impose in relation to emergencies, national security and public service content are inappropriate and unnecessary. They allow for undue intrusion into editorial independence and serve no legitimate purpose. Professional broadcasters can be expected to provide appropriate coverage of emergencies, particularly natural disasters. The issue of public service content should be dealt with through the licensing process and, in particular, through the proposals broadcasters make regarding

content when they apply for a licence, rather than through imposing such content by regulations measures.

A right of reply can be an effective sanction as it responds to problematical content by promoting more speech rather than by banning speech. However, it is not appropriate to require broadcasters to grant such a right whenever someone's character or reputation has been adversely affected. This would exert a serious chilling effect on broadcasters and require them to give a reply even for entirely factual criticisms of political figures. Instead, the right should apply only where factually incorrect statements breach the legal right of the claimant to reputation (i.e. where they are defamatory). Where a simple correction is sufficient to redress the harm to reputation, a broadcaster which carries a timely correction should not also have to grant a reply.

Recommendations:

- All rules relating to broadcasting content adopted pursuant to the broadcasting law should be the subject of wide consultation with broadcasters and other interested parties.
- The available sanctions for broadcasting content should, as with breach of the rules generally, be graduated and applied so as to be proportional to the breach and with a view to setting clear standards as to what is expected rather than punishing broadcasters.
- The 'must-carry' rules should be removed.
- The grounds for claiming the right of reply should be narrowed to cases where dissemination of a false statement breaches a legal right of the claimant, for example to reputation.

4. Other Issues

More thought might be given to the relationship the draft Act establishes between the staff of the Authority, and in particular the chief executive officer, and the Board. Pursuant to section 10(1), the Board appoints the employees of the Authority (it also appoints the chief executive officer pursuant to section 9(1)). In most cases, the chief executive officer appoints the staff, who in turn are responsible to him or her. The draft Act is also unclear as to the role of the Authority in relation to assessing licence applications. Pursuant to section 9(2)(d), one of the functions of the chief executive officer is to evaluate licence applications. But section 24(2) provides for these to be sent to the Board upon receipt, suggesting that there will be little evaluation by the chief executive officer.

Stronger provisions on transparency should be incorporated into the law. Section 21(3) provides for the purchase of the Authority's annual report but the law should also provide for the whole report to be available for free download from the Internet. Section 49 imposes a fairly comprehensive regime of secrecy in relation to matters that come before the different organs of the Authority. This is incompatible with modern governance, which requires public bodies like the Authority to operate transparently and in accordance with the principle of maximum disclosure of information to the public.

The draft Act includes only very brief provisions on public broadcasting. According to section 39, the Authority shall issue a five-year licence to the Dominica Broadcasting Corporation

(DBC) in respect of existing services which it was providing for free at the time the law came into force. Although formally there is nothing wrong with this, it might be preferable to provide more of a long-term guarantee for the operation of the DBC. Paragraph 8 of the Fifth Schedule sets out a programming mandate for DBC, a welcome inclusion in the law. However, it would be preferable if the law also provided for the transformation of DBC into a true public service broadcaster, in particular by establishing it as an independent body.

Recommendations:

- Consideration should be given to allocating authority for appointment of the employees of the Authority to the chief executive officer.
- It should be made clear that, when forwarding licence applications to the Board, the chief executive officer should include his or her recommendations in respect of them.
- The Authority should be required to make its annual report available over the Internet for free.
- Section 49, providing for confidentiality, should either be removed or be substantially revised to ensure that the Authority operates openly.
- Consideration should be given to incorporating more developed provisions on public broadcasting into the law which ensure the longer-term operation of DBC and which transform it into an independent public service broadcaster.

Key Recommendations

Independence:

- Political figures, including the Minister, should not exercise regulatory powers over the media. The draft Act should instead vest regulatory powers in the Authority.
- The Authority should be accountable to the people of Dominica through the Parliament, and not to the Minister. Independence should be guaranteed, among other things, through the appointments process for members of the Board of the Authority.
- The Complaints Committee and the Appeals Tribunal should also be appointed in a manner that protects their independence.

Licensing:

- The licensing regime should not apply to the Internet.
- The licensing regime should be overseen by the Authority, not the Minister, and it should provide for a clear and fair set of rules that aim to promote, among others, a pluralistic broadcasting environment.
- The entire system for sanctioning broadcasters for breach of the law, particularly inasmuch as it relates to licence suspension and revocation, should be revised to ensure that sanctions are applied in a fair and proportionate manner.

Content Rules:

- All content rules should be adopted only after wide consultation with interested parties and any sanctions should be proportionate and aim to set standards as to what is appropriate rather than punish broadcasters.

Other Issues:

- Consideration should be given to transforming Dominica Broadcasting Corporation into a true public service broadcaster.

About the ARTICLE 19 Law Programme

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. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 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 legal 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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