

ARTICLE 19

# Somalia: Draft Media Law

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July 2013

Legal analysis

# Executive summary

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In this analysis, ARTICLE 19 examines the draft Media Law of Somalia which was passed by the Council of Ministers on 11 July 2013 (Draft Law).

The analysis is aimed at informing the work of the Technical Expert Committee on Re-drafting the Somali Media Law, set up by the Deputy Minister of Information, Abdishakur Ali Mire, following the international criticism of the Draft Law.

ARTICLE 19 finds that the Draft Law clearly violates international human rights law on freedom of expression, particularly Article 19 of the International Covenant on Civil and Political Rights, and Article 9 of the African Charter on Human and Peoples' Rights. Although the Draft Law has some positive aspects, such as the proclamation on media freedom and safeguards for transparency of media ownership, it reinforces the state control over the media by allowing censorship of state media, giving powers to the Ministry of Information to authorise private media and requiring permission for the operation of foreign media. Moreover, the Draft Law contains blank and vague prohibitions on expressions like “harming the country, the people or the religion.” Last but not least, it sets out a media regulator, the National Media Council, which is not independent.

ARTICLE 19 hopes that the Technical Expert Committee will incorporate these suggestions into the revised version of the Draft Law. We call on the Federal Government to support this process and make sure that any further drafts of the law are fully in compliance with international freedom of expression standards. We also encourage civil society organisations and media in Somalia and beyond to continue their campaign to persuade the Somali federal government and legislature to adopt the media law in line with international standards on media freedom and freedom of expression.

## Summary recommendations

ARTICLE 19 calls on the drafting Committee to ensure that the following recommendations are fully incorporated in the final draft of the Law.

1. The Draft Law must fully guarantee freedom and independence of electronic, print and other media of all types.
2. The Draft Law should stipulate that the right to freedom of the media is understood as the right of every physical and legal person to receive and impart information through the media without prior hindrance by a public authority.
3. The Draft Law should explicitly state that any restriction of the right to freedom of media must fully comply with three-part test on limitations on the right to freedom of expression as follows:
  - The restriction must be directly intended at fulfilment of one of the following legitimate purposes: respect for the rights and reputations of others, protection of national security, public order, or public health and morals;

- The restriction must be necessary for the fulfilment of the legitimate purpose, which implies that it responds to a pressing social need, it is proportionate to the stated legitimate aim, and it is the least restrictive measure to the right to freedom of expression.
4. The Draft Law should prohibit censorship. It should explicitly prohibit the state to both
    - exercise control over, or interfere with, any person concerned in broadcasting, production or circulation of any publication, or in the dissemination of information by any medium; and
    - harass or penalize any person for any opinion or view.
  5. The Draft Law should state that the media cannot be compelled to publicise information complimentary either to the government or to the opposition.
  6. The Draft Law must stipulate that any restriction on the right to freedom of expression and media freedom shall be provided by law, serve a legitimate aim and be necessary in a democratic society.
  7. The current definition of journalist should be removed from the Draft Law. Any future definition should be broad and stipulate that “journalist” is any natural person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.
  8. The Somali citizenship and professional requirements for journalists should be removed from the Draft Law.
  9. The requirement for recognition of journalists by the National Media Council should be removed from the Draft Law.
  10. Foreign journalists and representatives of foreign media should work in Somalia without the permission by the Ministry of Information. Instead they should need to obtain a work visa from the Ministry of Foreign Affairs only.
  11. The Draft Law must guarantee the right of protection of journalistic sources. It should explicitly stipulate that journalists have a right not to reveal confidential sources of information or disclose other material held for journalistic purposes except in accordance with the following principles:
    - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
    - the information or similar information leading to the same result cannot be obtained elsewhere;
    - the public interest in disclosure outweighs the harm to freedom of expression; and
    - disclosure has been ordered by a court, after a full hearing.
  12. The Draft Law should also guarantee special protection to journalists against physical violence and attacks. The Somali Government should also make it a priority that state authorities adopt comprehensive measures to prevent attacks on journalists and others exercising their right to freedom of expression, investigate the circumstances of attacks and prosecute those responsible.
  13. The Draft Law should not set out specific duties for journalists. Instead it should provide that the professional standards on journalism are the responsibility of the media profession.
  14. Article 16 of the Draft Law on Ethics of Journalism should be removed because it is vague and gives priority of certain interests over the right to freedom of expression.
  15. The Draft Law should explicitly stipulate that the National Media Council may, upon application in the prescribed manner and subject to such conditions as the Commission may deem necessary, grant a license. Such conditions may relate to:

- the areas and geographical limits of broadcasting;
  - a minimum amount of time as may be prescribed in its programme schedule to locally produced programmes, or, in the alternative, pay such amount of money as may be prescribed, into a fund to assist the development of the Somalia production industry.
16. The Draft Law should also state that, when considering applications for the grant of a broadcasting license, the Commission shall have regard to the:
- observance at all times of public interest obligations in all broadcasting categories;
  - diversity and plurality of views for a competitive marketplace of ideas;
  - availability of radio frequency spectrum including the availability of such spectrum for future use;
  - efficiency and economy in the provision of broadcasting services;
  - demand for the proposed broadcasting service within the proposed broadcast area;
  - expected technical quality of the proposed service, having regard to developments in broadcasting technology;
  - suitability, capability, experience and expertise of the applicant in as far as carrying out such broadcast service is concerned; and
  - financial means and business record, if any, of the applicant.
17. The Draft Law should further provide that:
- Licensee may be charged a licence fee but this should not be excessive taking into account the development of the sector, the competition for licences and general considerations of commercial viability. Fees for different types of licenses should be set out in advance, according to a schedule.
  - The duration of licences shall be 5 years.
  - The licences are renewable. Licensees benefit from a presumption of licence renewal, although this may be overcome for public interest reasons or where the licensee has substantially failed to comply with the licence terms and conditions.
  - Any refusal to renew a licence should be accompanied by written reasons.
  - The National Media Council shall examine the applications for licences at public hearings with the participation of the candidates.
  - Candidates for broadcasting licences shall have a right to appeal the decisions of the National Media Council concerning broadcasting licences before the court.
  - Decisions of the National Media concerning broadcasting licences shall be duly reasoned and made available to the public.
  - Operation of unlicensed broadcasting services should be punished by fine.
  - Suspension of broadcasting services shall be applied as a last resort only for the most serious offences.
18. The Draft Law should not give powers to the Ministry of Information to grant authorisation and registration of private media organisations, to permit the operation of foreign media, to propose and approve the NMC members, to examine appeals against decisions by the NMC and to handle with media related complaints. Finally the Ministry of Information should not be responsible for state media.
19. The Draft Law must establish an independent media regulator. The members of the NMC should be nominated by the media and civil society organisation and appointed by Parliament or President.

20. The Draft Law should secure the independence through incompatibility rules, rules on dismissals of the NMC members and their term of office.
21. The Draft Law should secure the financial autonomy of the NMC through a diversity of sources of funding, with the largest contribution being made by the media industry and international donors.
22. The Draft Law should set out procedures for the exercise NMC powers which guarantee the rights of journalist and media.
23. The NMC should hear complaints with respect to both private and state media.



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## About the Article 19 Law Programme

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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 publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this policy brief further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [legal@article19.org](mailto:legal@article19.org).

# Introduction

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In this analysis, ARTICLE 19 outlines the key concerns with the Draft Media Law of Somalia (Draft Law), which was passed by the Council of Ministers on 11 July 2013.

Following the international criticism of the Draft Law, on 28 July 2013, a Technical Expert Committee on Re-drafting the Media Bill was launched to work on the revised version of the Media Law, before it is submitted to the Federal Parliament later this year.

ARTICLE 19 supported the strong opposition of the Draft Law by the National Union of Somali Journalists, the media owners and the civil society. We welcome efforts of the Somali Prime Minister to reform the media legislation in view of our critical assessments of the existing law and the 2010 Draft Law amending it.<sup>1</sup> We hope that this analysis will inform the work of the Committee and will assist the experts in the re-drafting process.

The Draft Law regulates a wide range of media matters, such as private media ownership, operation of foreign media in Somalia, the structure and powers of a media regulatory body, the National Media Council (NMC), registration of media organisations, administrative liability for breaches of media regulation, status of media professionals including their rights and duties, journalism ethics, copyright regulation and law enforcement responsibilities.

ARTICLE 19's analysis is based on observations about the compliance of the draft Law with international media freedom standards and best practices on media regulation. The relevant international standards are derived from the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup>, African Charter on Human and Peoples' Rights<sup>3</sup>, Declaration of Principles on Freedom of Expression in Africa<sup>4</sup>, the joint declarations of the three international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of

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<sup>1</sup> ARTICLE 19, Note on the Draft Media Law of Somalia, January 2008; available at <http://www.article19.org/pdfs/analysis/somalia-media-note.pdf>; and Comment on the Amendments to the 2007 Media Law, September 2008, available at <http://www.article19.org/data/files/pdfs/analysis/somalia-comment.pdf>.

<sup>2</sup> Adopted on 16 December 1966 in New York, entered into force on 23 March 1976. Somalia acceded to the ICCPR on 24 Jan 1990.

<sup>3</sup> Adopted on 27 June 27 1981 in Banjul, entered into force on 21 October 1986. Somalia signed the Charter on 26 February 1982 and ratified it on 31 July 1985.

<sup>4</sup> Adopted by the African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.



Expression and Access to Information<sup>5</sup>, and recommendations on media and freedom of expression issues developed by the Council of Europe and ARTICLE 19.

Although the Draft Law has some positive features from freedom of expression perspective (for example, the proclamation on media freedom and safeguards for transparency of media ownership), it reinforces the state control over the media by allowing censorship on state media, giving powers to the ministry of information to authorise private media and permissions for the operation of foreign media. Moreover the Draft Law is not in compliance with international law because it provides for blank and vague prohibitions on expressions like “harming Islam and Somali culture and the people of Somalia”. Finally, the National Media Council set out by draft Law is not independent and its powers are limited to private media predominately. The following section analyses these provisions in greater detail.

ARTICLE 19 stands ready to support the review process and provide further support to the Expert Committee and the Government in bringing the Draft Law in full compliance with international human rights standards.

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<sup>5</sup> The joint declarations are available at <http://www.osce.org/fom/66176>.

# Analysis of the Draft Law

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## Positive aspects of the Draft Law

ARTICLE 19 finds that the Draft Law contains the following positive features:

- Explicit proclamation of media freedom (Article 2);
- A recognition of a right of citizens to start private media (Article 4);
- A permission for foreign media representatives to work in Somalia (Article 5);
- A diverse membership of the National Media Council (Article 6 (1));
- Safeguards for transparency of media ownership (Article 10).

These provisions should be retained in the final version of the Law.

## Problematic aspects of the Draft Law

The following aspects of the Draft Law must be revised in the re-drafting process.

### Definition of media freedom

Article 2 of the Draft Law proclaims the freedom of the media by referring to the Constitution and international and regional laws and prohibiting the censorship of private media.

ARTICLE 19 finds these guarantees to media freedom weak and insufficient. The scope of media freedom cannot be set out by a reference to the Constitution and international laws because most people are not familiar with international law. Moreover the prohibition on censorship should apply to all media as opposed to private media only.

ARTICLE 19 recommends that Article 2 reaffirm the guarantees for freedom of expression and media freedom set out in Article 19 of the ICCPR, and Article 9 of the African Charter. It should also prohibit state media control and harassment or penalization for any opinion and view.

### **Recommendations:**

- The Draft Law must fully guarantee freedom and independence of electronic, print and other media of all types.
- The Draft Law should stipulate that the right to freedom of the media is understood as the right of every physical and legal person to receive and impart information through the media without prior hindrance by a public authority.
- The Draft Law should explicitly state that any restriction of the right to freedom of media must fully comply with three-part test on limitations on the right to freedom of expression as follows:
  - The restriction must be directly intended at fulfilment of one of the following legitimate purposes: respect for the rights and reputations of others, protection of national security, public order, or public health and morals;
  - The restriction must be necessary for the fulfilment of the legitimate purpose, which implies that it responds to a pressing social need, it is proportionate to the stated legitimate aim, and it is the least restrictive measure to the right to freedom of expression.

- The Draft Law should prohibit censorship. It should explicitly prohibit the state to both
  - exercise control over, or interfere with, any person concerned in broadcasting, production or circulation of any publication, or in the dissemination of information by any medium; and
  - harass or penalize any person for any opinion or view.
- The Draft Law should state that the media cannot be compelled to publicise information complimentary either to the government or to the opposition.

### **Restrictions on media freedom**

The Draft Law does not contain any special provisions on restrictions on media freedom. Various forms of restrictions are set out in the Draft Law, however they are not in line with the international law criteria on lawfulness of limitations on media freedom.

ARTICLE 19 reminds the drafters that under international law, the right to freedom of expression and media freedom can be restricted lawfully only when specific criteria are met. The criteria are set out in Article 19 para 3 of the ICCPR and Principle II of the Declaration of Principles on Freedom of Expression in Africa. The latter provides that

Any restriction on freedom of expression shall be provided by law, serve a legitimate aim and be necessary in a democratic society.<sup>6</sup>

ARTICLE 19 recommends that the Draft Law includes a provision setting out the criteria for legality of restrictions on the right to freedom of expression and media freedom.

### **Recommendation:**

- The Draft Law must stipulate that any restriction on the right to freedom of expression and media freedom shall be provided by law, serve a legitimate aim and be necessary in a democratic society.

### **Requirements for journalists**

Article 25 of the Draft Law contains a definition of a journalist. To be regarded as a journalist, one must be a Somali citizen and should have graduated from a media training institute, or hold equivalent qualifications or have acquired knowledge of the media professions.

ARTICLE 19 is concerned about this definition as it sets unjustified limitations on practicing journalism. Unlike the profession of lawyers or doctors, the profession of journalism is an

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<sup>6</sup> Article 38 of the Provisional Constitution of Federal Republic of Somalia has adopted this principle by stating: “A right may be limited by law, or by specific exceptions in this Chapter, only if that limitation is demonstrably reasonable and justified according to the values underlying this Constitution.”

exercise of the human right of freedom of expression. Therefore, any requirement for journalists should be in line with international law.

The definition of journalist in Draft Law is also problematic because of the prerequisite for citizenship and professional requirements. We recall that the right to express oneself through the mass media belongs to everyone, not only Somali citizens or people who the government considers particularly qualified or suitable. From a comparative perspective, we note that the Inter-American Commission on Human Rights has issued a Declaration condemning one specific type of entry requirement:

Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.<sup>7</sup>

The three special mandates on freedom of expression at the OAS, UN and OSCE have also stated that there should be no legal restrictions on who may practise journalism.<sup>8</sup>

**Recommendation:**

- The current definition of journalist should be removed from the Draft Law. Any future definition should be broad and should stipulate that “journalist” is any natural person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.
- The Somali citizenship and professional requirements for journalists should be removed from the Draft Law.

**Licensing of national and foreign journalists**

Article 25 of the Draft Law provides that journalists must be recognised by the National Journalists Union. According to Article 5 (5) of the Draft Law, foreign media sending representative in Somalia should get permission from the Ministry of Information.

ARTICLE 19 is concerned about these provisions. We find that the powers vested onto the National Journalist Union to recognise people as journalists would amount to licensing of journalists that is prohibited under international law.<sup>9</sup> For example, in their 2004 Declaration the three special mandates for protecting freedom of expression (the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media

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<sup>7</sup> Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108<sup>th</sup> regular session, 19 October 2000, available at <http://www.cidh.oas.org/declaration.htm>.

<sup>8</sup> Joint Declaration of 18 December 2003.

<sup>9</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5, available at [http://www.corteidh.or.cr/serieapdf\\_ing/seriea\\_05\\_ing.pdf](http://www.corteidh.or.cr/serieapdf_ing/seriea_05_ing.pdf).

and the OAS Special Rapporteur on Freedom of Expression) stated that individual journalists should not be required to be licensed or to register.<sup>10</sup>

There is no justification for recognition or permission of journalists to operate. We reiterate that (in contrast with other professions), the activities of journalists – the seeking, receiving and imparting of information and ideas – are specifically protected as a human right, namely the right to freedom of expression. Everyone should be able to exercise this right without permission or recognition.

Finally, ARTICLE 19 points out that any system of control of the right to freedom of expression can be the source of great abuse and violations of the right to information.

### **Recommendations:**

- The requirement for recognition of journalists by the National Media Council should be removed from the Draft Law.
- Foreign journalists and representatives of foreign media should work in Somalia without having to obtain permission from the Ministry of Information. Instead they should need to obtain a work visa from the Ministry of Foreign Affairs only.

### **Rights of journalists**

Article 27 of the Draft Law recognises a number of legal rights of journalists. These include: the right to preserve personal security and dignity; the right to express themselves freely and freely disseminate all information; the right to receive information; the right to private and separate unions in order to defend their interests.

Although these provisions are positive, ARTICLE 19 notes that these are human rights and as such they belong to everyone rather than journalists only. Instead, we believe that the Draft Law should recognise specific journalistic rights such as the right to protect journalists' sources and the right to protection against physical threats or attacks.

**Protection of sources:** In particular, ARTICLE 19 finds that the lack of recognition of the right to protect journalistic sources is a serious shortcoming of the Draft Law. This right has been recognized internationally in a number of international and regional standards as well as in legislation of over 100 countries. The Declaration of Principles on Freedom of Expression in Africa also contains strong safeguards for the protection of sources. It states:

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;

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<sup>10</sup> Joint Declaration of 18 December 2003.

- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and disclosure has been ordered by a court, after a full hearing.<sup>11</sup>

**Attacks on journalists:** ARTICLE 19 notes physical threats and attacks against media workers aimed at silencing them are arguably the most egregious interference with the right to freedom of expression possible.

The importance of the protection of media workers has been recognized by international and regional bodies at a number of occasions. The African Commission's Declaration of Principles on Freedom of Expression states:

Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.

States are under an obligation to take effective measures to prevent such attacks [...]<sup>12</sup>

These guarantees of the protection of journalists are of particular concerns to Somalia, which has repeatedly been referred to as one of the most dangerous places on earth to be a journalist. The lack of any provisions on this matter in the Draft Law must be addressed as a matter of priority.

#### **Recommendations:**

- The Draft Law must guarantee the right of protection of journalistic sources. It should explicitly stipulate that journalists have a right not to reveal confidential sources of information or disclose other material held for journalistic purposes except in accordance with the following principles:
  - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
  - the information or similar information leading to the same result cannot be obtained elsewhere;
  - the public interest in disclosure outweighs the harm to freedom of expression; and
  - disclosure has been ordered by a court, after a full hearing.
- The Draft Law should also guarantee special protection to journalists against physical violence and attacks. The Somali Government should also make it a priority that state authorities adopt comprehensive measures to prevent attacks on journalists and others exercising their right to freedom of expression, investigate the circumstances of attacks and prosecute those responsible.

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<sup>11</sup> 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, Principle XV.

<sup>12</sup> Declaration of Principles on Freedom of Expression in Africa, *ibid.* Principle XI.

### **Duties of journalists**

Article 26 of the Draft Law sets out a number of duties of journalists and “officials responsible for the media.” The duties relate to their competence; ability to identify sources; respect of the rights of ‘person, institutions, laws of the land, or culture of the people’; prohibition of dissemination of ‘false news’ and of “propaganda harming security or national stability, unity of the country or the peaceful coexistence of those living within society” and prohibition of collection of secret information or personal photographs by deceit or by theft.’

Journalists are also obliged to release before courts information of their source of information if “the dissemination of the information stirs public sentiments.” Media bosses and journalists have a duty to release edited news that shows impartiality and is based on facts, without infringing on press freedoms.”

Article 5 (3) of the Draft Law sets out obligations for foreign journalists. They should avoid any actions contravening media law, Islam, Somali culture and other state laws.

Article 16 of the Draft Law deals with journalism ethics. It sets out that the Somali media shall avoid broadcasting and dissemination of materials “harming the country, the people or the religion” through false and unfounded information, or information harming the national security, information contrary to the law, “actual sexual organs of a human being” and pictures depicting tortured human bodies, sexual violence and graphic contents.

ARTICLE 19 has the following comments to these provisions:

- First, we reiterate that by imposing obligations on journalists – be they national or foreign - the state unnecessarily interferes with media freedom.
- Second, we are of the opinion that journalists – and not the state - should define professional standards of journalists and media ethics including their obligations. Self-regulation should be the preferred model for the regulation of journalism as it limits the opportunities for state interference and control.
- Third, we find that all obligations set out in Article 26 of the Draft Law limit the right to freedom of expression in violation of international law. Although the duties aim at protecting rights and public interests, they give priority to these rights and interests over the right to freedom of expression. This is in conflict with international law rules that the states should seek to balance between conflicting rights. For example, both Principle II of the Declaration of Principles on Freedom of Expression in Africa and Article 38 (3) of the Provisional Constitution of Federal Republic of Somalia which set out that the restriction of freedom of expression should be reasonable and necessary by taking into account the circumstance of any case.
- We find the provisions of Article 16 of the Draft Law (relating to journalism ethics) to be vague and overbroad. We are concerned that it can be used to prosecute and punish journalists for legitimate expression. For example, the meaning of the ban on “harming the country, the people or the religion” is vague. Moreover, like Article 26, Article 16 is in conflict with international law because it gives priority to certain rights and interest over the right to freedom of expression. In contrast international law provides for



balancing between conflicting rights. Any restriction of freedom of expression should be necessary by taking into account the circumstance of any case.

**Recommendations:**

- The Draft Law should not set out specific duties for journalists. Instead it should provide that the professional standards on journalism are the responsibility of the media profession.
- Article 16 of the Draft Law on Ethics of Journalism should be removed because it is vague and gives priority of certain interests over the right to freedom of expression.

**Licensing of the media**

Article 4 (2) of the Draft Law provides that all private media organisations cannot operate without authorisation and registration given by the Ministry of Information. Article 8 sets out that all media regardless of their type must register with the Ministry of Information. The draft Law envisages registration fees (in Article 9) and provides for registration certificates (in Article 11). The Draft Law does not set out the procedures for obtaining authorisation and registration.

Article 17 of the Draft Law provides that any person who operates an unregistered media organisation shall be brought to justice and the media organisation shall be immediately closed.

ARTICLE 19 is concerned that the licensing regime applies to all media. We point out that the UN, OAS and OSCE special mandates on freedom of expression have declared:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided.<sup>13</sup>

Under international law only the licensing of broadcast media is justified and necessary inasmuch as it concerns the allocation of broadcast frequencies which are limited public resources. Therefore, ARTICLE 19 recommends that the draft Law removes the licensing obligations for all but broadcast media.

ARTICLE 19 is also concerned that the Draft Law contains no guarantees for fair and impartial allocation of licences such as procedural licence requirements and the criteria for frequency allocation.

Moreover, by granting authorisation powers to the Ministry of Information the draft Law subjects licensing to political control. We point out that the Declaration of Principles on Freedom of Expression in Africa sets out that the broadcasting regulatory system should operate in accordance with the principle of equitable allocation of frequencies between

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<sup>13</sup> Adopted 18 December 2003; available at <http://goo.gl/VM8005>.



private broadcasting users and that licensing process shall be fair and transparent and shall seek to promote diversity in broadcasting.<sup>14</sup>

Finally, ARTICLE 19 is concerned about the harsh sanctions against media organisation which operate without registration. We note that under international law all sanctions on media organisation should be necessary and proportionate. Therefore suspension of broadcasting services or closure of media organisation should be applied as a last resort for the most serious offences only.

ARTICLE 19 recommends the inclusion of provisions setting out the procedure for obtaining broadcast licences. It should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity. All decisions taken and regulations adopted by the regulatory authorities should be:

- duly reasoned, in accordance with national law;
- open to review by the competent jurisdictions according to national law; and
- made available to the public

Finally, ARTICLE 19 recommends that the draft Law grant powers for allocation of broadcast licences to an independent National Media Council.

#### **Recommendations:**

- The Draft Law should explicitly stipulate that the National Media Council may, upon application in the prescribed manner and subject to such conditions as the Commission may deem necessary, grant a license. Such conditions may relate to:
  - the areas and geographical limits of broadcasting;
  - a minimum amount of time as may be prescribed, in its programme schedule to locally produced programmes, or, in the alternative, pay such amount of money as may be prescribed, into a fund to assist the development of the Somalia production industry.
- The Draft Law should also state that, when considering applications for the grant of a broadcasting license, the Commission shall have regard to the:
  - observance at all times of public interest obligations in all broadcasting categories;
  - diversity and plurality of views for a competitive marketplace of ideas;
  - availability of radio frequency spectrum including the availability of such spectrum for future use;
  - efficiency and economy in the provision of broadcasting services;
  - demand for the proposed broadcasting service within the proposed broadcast area;
  - expected technical quality of the proposed service, having regard to developments in broadcasting technology;
  - suitability, capability, experience and expertise of the applicant in as far as carrying out such broadcast service is concerned; and

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<sup>14</sup> Principle 5 (2) of the Declaration of Principles on Freedom of Expression in Africa.

- financial means and business record, if any, of the applicant.
- The Draft Law should further provide that:
  - Licensee may be charged a licence fee but this should not be excessive taking into account the development of the sector, the competition for licences and general considerations of commercial viability. Fees for different types of licenses should be set out in advance, according to a schedule.
  - The duration of licences shall be 5 years.
  - The licences are renewable. Licensees benefit from a presumption of licence renewal, although this may be overcome for public interest reasons or where the licensee has substantially failed to comply with the licence terms and conditions.
  - Any refusal to renew a licence should be accompanied by written reasons.
  - The National Media Council shall examine the applications for licences at public hearings with the participation of the candidates.
  - Candidates for broadcasting licences shall have a right to appeal the decisions of the National Media Council concerning broadcasting licences before the court.
  - Decisions of the National Media concerning broadcasting licences shall be duly reasoned and made available to the public.
  - Operation of unlicensed broadcasting services should be punished by fine.
  - Suspension of broadcasting services shall be applied as a last resort for the most serious offences.

### **Independence of the media from the state**

#### **Ministry of Information**

ARTICLE 19 is concerned about the significant powers given by the Draft Law to the Ministry of Information. These powers include:

- Granting authorisation and registration for operation of private media organisations (Article 4 para 3 and Article 8);
- Granting permission to representatives of foreign media to operate in Somalia (Article 5 para 5);
- Propose five out of the fifteen members of the National Media Committee (NMC) (Article 6 (1)) and proposal of the appointment of the whole NMC (Article 6 para 5);
- Examination of appeals against decisions by the NMC relating to registration of media organisations (Article 11 para 3);
- Operating as a depositor of any change occurring in the appearance, the capacity or efficiency of a media organisation that has received authorisation (Article 14) and information of any alteration occurring to the title, the ownership of the organisation or its executive directorship (Article 15);
- Responsibility for the state media (Article 23);
- Handling with media related violations (Article 28).

ARTICLE 19 finds that by granting these powers to the Ministry of Information, the Draft Law subjects the media under state control. International law prohibits such control. We recall that Principle VII of the Declaration of Principles on Freedom of Expression in Africa sets out that the public authorities that exercise powers in the media field should be independent and adequately protected against interference. As the Ministry of Information is not such an independent body, ARTICLE 19 maintains that it should not have media regulatory powers.

Instead the Ministry should be responsible for general media policy, preparation of draft media laws and promotion of a general economic environment in which the media can flourish.

**Recommendation:**

- The Draft Law should not give powers to the Ministry of Information to grant authorisation and registration of private media organisation, to permit the operation of foreign media, to propose and approve the NMC members, to examine appeals against decisions by the NMC and to handle media related complaints. Finally the Ministry of Information should not be responsible for state media.

**The National Media Council**

Articles 6 and 7 set out the structure of the NMC and its mandate. State bodies (parliamentary information committee and the ministry of information) propose 8 out of the 15 NMC members. The remaining members are appointed by the Somali journalists and lawyers. However the NMC is appointed by a complex procedure including a proposal by the Minister of Information, approval by the Cabinet and endorsement by the President.

The mandate of the NMC includes safeguarding the ethics and media law in Somalia, safeguarding the impartiality and corrections by the private media, assessing the operation of private media and suggesting the withdrawal of licenses from private media, examining media-related complaints and sanctioning journalists and media.

ARTICLE 19 has the following concerns about these provisions:

- The state control over the NMC: the NMC is placed under state control since the majority of its members represent the public bodies. Moreover the draft Law does not proclaim the independence of the NMC and contains no independence safeguards such as clearly defined powers, incompatibility rule for the NMC members and rules relating to their dismissal and financial autonomy.
- The Draft Law does not set out the procedures for the exercise of the NMC powers. The silence of the law deprives media and journalists of safeguards against abuse of power.
- We find it problematic that the Draft Law contains no rules on NMC staff, their employment contracts and salaries. ARTICLE 19 considers that without such rules the NMC's administrative capacity is not guaranteed.
- It is unclear why the NMC powers predominately concern private media only. ARTICLE 19 is concerned that the existence of separate regulatory bodies for private and state media could lead to discrimination. We point out that the Declaration of the Principles on Freedom of Expression in Africa guarantees the equal opportunity for everyone to

exercise the right to freedom of expression and to access information without discrimination.<sup>15</sup>

**Recommendations:**

- The Draft Law must establish an independent media regulator. The members of the NMC should be nominated by the media and civil society organisation and appointed by Parliament or President.
- The Draft Law should secure the independence through incompatibility rules, rules on dismissals of the NMC members and their term of office.
- The Draft Law should secure the financial autonomy of the NMC through a diversity of sources of funding, with the largest contribution being made by the media industry and international donors.
- The Draft Law should set out procedures for the exercise NMC powers which guarantee the rights of journalist and media.
- The NMC should hear complaints with respect to both private and state media.

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<sup>15</sup> Principle I (2) of the Declaration.