MEMORANDUM

on the

draft Media Act of the Cook Islands

November 2006

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1. INTRODUCTION

This Memorandum provides comments on the draft Cook Islands "Act to establish the Media Commission" (the draft Act), which is likely to be placed before the newly elected parliament in the 2006/2007 session.

If adopted, the Act would establish a Commission with broad regulatory powers over the media in the Cook Islands. The Commission would be appointed by the minister responsible for broadcasting, and while its primary functions would appear to be in regard to radio and television, it would also have broad regulatory powers over print and internet media content. It would, amongst other things, not only license the broadcast media but it would also monitor the extent to which all media comply with "community standards and expectations" and hear and decide complaints brought by members of the public. If it upholds a complaint, it may direct the media outlet concerned to publish a correction or apology; if the media outlet fails to comply with the direction, then a fine of up to NZD10,000 may be imposed. It would also draft relevant codes of conduct for the media, which are then formally approved by the relevant government minister.

ARTICLE 19 is concerned at both the broad regulatory sweep that the Commission is likely to have, and at the lack of independence of the envisaged Media Commission. The Commission would have regulatory powers over print and internet-based media as well as over broadcast media. We do not feel that this is appropriate; self-regulation is internationally recognised as the preferred form of regulation for print and internet media. We also note that no democratic country in the world has the kind of controls over internet content as proposed in the draft Media Act. If the proposed internet content control is pushed through, Cook Islands would find itself in the company of countries such as Kazakhstan.

We are also deeply concerned at the lack of any safeguards to protect the Media Commission's independence from the government or political or economic interests. The Commission's board is to be appointed by the Minister – and two of five Board members, including the chair, will be appointed wholly within the minister's discretion – and the Commission will be required to act on any policy directives received from the Government. Coupled with the short terms of office of members of the board, this will leave the Commission wide open to governmental manipulation.

We are also concerned at the vagueness of some of the licensing criteria – in particular, the lack of what any definition of what "fit and proper" means in the context of what persons may hold a licence – and at the undue discretion given to the Media Commission in relation to licence suspension or revocation.

The following paragraphs elaborate on these concerns and recommendations. Our comments are based on international human rights law and best comparative practice in media regulation. Section 2 of this Memorandum sets out the applicable standards in international law; Section 3 compares key parts of the draft Act against those standards.[1]

[1] Given the seriousness of our concerns with regard to the Commission's independence and the extent of the proposed regulation, we do not comment on some of the smaller detail of the draft Act.

2. INTERNATIONAL STANDARDS

2.1. International and Constitutional Guarantees of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[2] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

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

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[3] The 1993 Vienna World Conference on Human Rights reaffirmed its full commitment to the *Universal Declaration of Human Rights*.[4]

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a formally binding legal treaty, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR. Although the Cook Islands has neither signed nor ratified the ICCPR, it is nonetheless an authoritative elaboration of the rights set out in the UDHR and hence of relevance here.

The Cook Islands own Constitution guarantees the right to freedom of expression at Section 64.[6]

The right to freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights* (ECHR),[7] Article 13 of the *American Convention on Human Rights*[8] and Article 9 of the *African Charter on Human and Peoples' Rights*.[9] While neither these treaties nor the judgments of courts and tribunals established under them are formally binding on the Cook Islands, they provide good evidence of the appropriate interpretation of the right to freedom of expression as guaranteed by the UDHR and the ICCPR as well as by the Cook Islands Constitution.

2.2. The Importance of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946, the UN General Assembly adopted

[2] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[3] See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.
[4] Report of the World Conference on Human Rights, UN Doc. No. A/CONF.157/24 (Part I), 13 October 1993.
[5] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976. The ICCPR had been ratified by some 160 States by November 2006.
[6] Constitution of the Cook Islands, Section 64(1)(e): http://www.paclii.org/ck/legis/num_act/cotci327/.
[7] Adopted 4 November 1950, in force 3 September 1953.
[8] Adopted 22 November 1969, in force 18 July 1978.
[9] Adopted 26 June 1981, in force 21 October 1986.

Resolution 59(I) which stated: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[10] The UN Human Rights Committee has stressed the importance of freedom of expression in a democracy:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. … this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[11]

The guarantee of freedom of expression applies to all forms of expression, not only those which fit with majority viewpoints and perspectives:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[12]

Freedom of expression has a double dimension; it protects not only the individual's right to impart information and ideas but also the general public's right to receive them. This is explicit in international guarantees of freedom of expression such as those quoted above, and has also been stressed by international courts.[13]

2.3. Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, limitations must remain within strictly defined parameters laid down by Article 19(3) of the ICCPR:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Any restriction on freedom of expression must meet a strict three-part test, as recognised by the UN Human Rights Committee. This test requires that any

[10] 14 December 1946. The term 'freedom of information' is used as a catch-all phrase for freedom of expression and the free circulation of ideas and information.
[11] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.
[12] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights). Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[13] See, for example, the judgment of the Inter American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Act for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, (Series A) No. 5 (1985), para. 30.

restriction must a) be provided by law, b) be for the purpose of safeguarding one of the legitimate interests listed, and c) be necessary to achieve this goal.

The first condition, that any restrictions should be 'provided by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.[14] The European Court of Human Rights, in its jurisprudence on the similarly worded ECHR provisions on freedom of expression, has developed two fundamental requirements:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[15]

The second condition requires that legislative measures restricting free expression must truly pursue one of the aims listed in Article 19(3) of the ICCPR, namely the protection of the rights or reputations of others or of national security, public order (*ordre public*) or public health or morals.

The third condition means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessary". This is a very strict test:

> [The adjective 'necessary'] is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable". [It] implies the existence of a "pressing social need".[16]

Furthermore, any restriction must restrict freedom of expression as little as possible. [17] The measures adopted must be carefully designed to achieve the objective in question, and they should not be arbitrary, unfair or based on irrational considerations.[18] Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

2.4. Media Regulation

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[19]

This does not imply that the media should be entirely free and unregulated. However, because media regulation affects both the media's right to freedom of expression and the public's right to

[14] *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).
[15] *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[16] *Ibid*., para. 59.
[17] *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).
[18] See *R. v. Oakes* (1986), 26 DLR (4th) 200, at 227-8, (Canadian Supreme Court).
[19] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 13, para. 34.

receive information, there are a number of constraints to it. First, and generally, any licensing system established by States must pass the 'prescribed by law' and 'necessary in a democratic society' parts of the three-part test for restrictions stipulated in Article 19(3) of the ICCPR.[20] Second, one of the main goals of regulation must be to promote pluralism and diversity in the media.[21] Third, any bodies with regulatory powers in this area must be independent of government, both formally, through the legislation that establishes them, and in actual fact and everyday practice.[22]

3. ANALYSIS OF THE DRAFT ACT

This section provides our detailed comments and suggestions regarding the draft Act. Broadly speaking, our concerns fall into three separate categories: first, a set of concerns regarding the wide regulatory scope of the proposed Media Commission; second, a set of concerns and recommendations regarding the independence and powers of the proposed Media Commission; and third, a miscellaneous set of concerns on licensing matters.

3.1. Wide Regulatory Scope of the draft Media Act

Part 2 of the draft Act sets out the functions of the proposed Media Commission. Clause 13 stipulates 7 separate functions:

(a) to encourage media in the Cook Islands to reflect and develop Cook Islands identity and indigenous culture;
(b) to encourage the coverage of television and radio broadcasting, and print media to parts of the Cook Islands that would otherwise not receive a commercially viable signal or newspaper;
(c) to advise the Minister on codes of publishing and broadcasting practice;
(d) to advise the Minister on advertising and internet codes of practice;
(e) to hear and determine licensing applications under Part 3 of this Act;
(f) to hear and determine complaints under Part 4 of this Act; and
(g) to monitor the extent to which broadcasters, publishers, advertisers and internet content providers comply with community standards and expectations.

Part 4 of the Act lays down, separately, the kind of 'standards' that the Commission should enforce. In particular, Clause 24(2) specifies that all media outlets – whether print, broadcasting or internet – must ensure that their output is consistent with the following principles:

(a) the observance of good taste and decency, taking into account community standards and the timing and context of the programme, article, advertisement or internet content;
(b) the maintenance of law and order;
(c) the privacy of the individual;
(d) the principle of balance that when controversial issues of public importance are addressed in news and current affairs, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or publication, or in other programmes or publications within the period of current interest, subject to the

[20] See, for example, *Informationsverein Lentia and Others v. Austria*, 28 October 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 32.
[21] *Ibid.*, para. 38.
[22] Council of Europe Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, adopted 20 December 2000.

right of all media to put forward editorial opinion provided the editorial nature of the comment is clearly apparent to the reader, listener, or viewer as the case may be; and
(e) news and current affairs being truthful and accurate on points of fact; and
(f) the requirement to deal justly and fairly with any person referred to in an article or programme, or who is taking part in a programme; and
(g) at certain times of the day, the need for broadcasters to take into account the young age of potential listeners and viewers.
Under Clause 25, the Minister may adopt codes of practice to elaborate on these principles, as proposed by the Media Commission after consultation with broadcasters, publishers, advertisers and internet content providers.

Clause 2 of the draft Act limits its applicability to only to those websites that originate from or are hosted within the Cook Islands, or those that are established or hosted overseas by a person who is ordinarily resident in the Cook Islands.

Analysis and comment
We are concerned by both the proposal that the Media Commission should have regulatory powers over the internet and print media, and by the vague nature of many of the proposed media standards.

Self-regulation for print and internet media
While it is well-established that broadcasting may be regulated by law, countries around the world have recognised that statutory regulation for print and internet media is unnecessary. While statutory broadcast regulation can be justified by the spectrum available for broadcasting use, no such justification exists for the print or internet-based media. Moreover, the principles outlined in Section 2.3, above, dictate that in order to protect and promote freedom of expression, the least restrictive means of regulation should be imposed on the media necessary to protect legitimate interests. Statutory bodies are always at risk of political interference and abuse; in our experience, they can function satisfactorily only in well-established democracies with a strong tradition of the rule of law.

Many established democracies see statutory regulation of the print media as anathema to press freedom. It is instructive to note that a recent private members attempt in the United Kingdom to introduce statutory regulation for the print media was firmly rejected by the UK Government on the grounds that "no laws should specifically restrict press freedom. The Government should not intervene in any way in what a newspaper or magazine chooses to publish. We support self-regulation and the basis of the Government's relationship with the independent Press Complaints Commission (*the UK self-regulatory body for the press – A19*) is support for effective self-regulation. Newspapers may not publish whatever they like, but must abide by the law, as we all must, and that includes laws covering defamatory material … To conclude, the Government have no intention of presiding over the end of more than 300 years of press freedom."[23]

This has also been recognised at the international level. In a Joint Declaration in 2003, the United Nations Special Rapporteur on Freedom of Opinion and Expression and his counterparts at the Organisation of American States and the Organisation for Security and Cooperation in Europe urged States to recognise the fundamental differences in nature

[23] House of Commons, Hansard Debates, 25 February 2005, cols. 614, 618, *per* the Parliamentary Under-Secretary of State for Education and Skills (Derek Twigg).

between print, broadcast and internet media with regard to regulation.[24] And in the African context, a formal Declaration has been adopted by the African Commission on Human and Peoples' Rights stating that "[e]ffective self-regulation is the best system for promoting high standards in the media."[25]

With regard to internet-based media, the Council of Europe's Committee of Ministers has adopted a Declaration that states: "Member states should encourage self-regulation or co-regulation regarding content disseminated on the Internet."[26] This is because the Internet as a medium is very different from the broadcast or print media. It includes small, one-person websites and blogs as well as large and professionally run news sites such as www.cnn.com; and political party websites sit 'side by side' with government ministry websites and the site of the local football or rugby club. These sites cannot all be subjected to the same exacting standards that are required of broadcasters.[27] The internet is also an international medium: content that is uploaded in New York can be immediately accessed in Moscow, and the news from Brisbane can be watched 'live' in Paris, France. There is no shortage of airwaves, unlike in the broadcast media, and, unlike the print media, no need for access to a print press and distribution network in order to be able to publish to a wide audience. Everyone with access to a PC and a telephone line can publish to a potential audience of millions on the internet. While this situation can be frightening to media regulators, there is no evidence that this huge diversity has led to lawlessness: like everyone else, internet publishers are liable under the laws of the land for information disseminated by them. If someone based in the Cook Islands publishes material on-line that is defamatory of another Cook Islander, then that can be dealt with in the local courts. In other words, there is no pressing need for the introduction of statutory regulation for the internet media. It is telling that no democratic country in the world has instituted the kind of overarching internet content regulation proposed in the draft Act.

Our overarching recommendation would therefore be that the Media Commission should have no regulatory or other powers over the internet or over print media. We see no evidence that self-regulation for these media in the Cook Islands has failed, nor do we see any other justification for introducing statutory regulation.

Broad scope of regulatory functions

Clause 24(2) of the draft Act outlines general content principles, stipulating, amongst other things, that all media output must be "in good taste and decency", "taking into account community standards", that news and current affairs output must be truthful and accurate, and that persons must be dealt with "justly and fairly". These general principles are to be elaborated by the Commission in separate codes of practice, and will then serve as the basis for a complaints mechanism.

While we appreciate the need for legislation to set out general principles, which are then elaborated upon in further detail in separate codes and regulations, we believe that a number of the principles outlined in the draft Act cross the line and are simply too broad. This is particularly the case with the requirement that programme output must be "in good taste and

[24] Joint Declaration of 18 December 2003, accessible at http://www.cidh.oas.org/relatoria/showarticle.asp?artID=88&lID=1.

[25] Principle IX, Declaration of Principles on Freedom of Expression in Africa, October 2002: http://www.achpr.org/english/resolutions/resolution67_en.html.

[26] Principle 2, Declaration on Freedom of Communication on the Internet, May 2003: http://www.coe.int/t/e/human_rights/media/H-Inf(2003)007_en.pdf.

[27] See the landmark judgment of the United States Supreme Court on the Communications Decency Act: *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

decency, taking into account community standards." Not only is it difficult to find truly commonly shared values, even within the numerically small Cook Islands community, the idea of "decency" is also easily abused to suppress political criticism, particularly when that is expressed in harsh terms. It is important to recall that while freedom of expression is not an unlimited right, it does protect speech or expression that some sectors of society may find offensive.

The requirement to deal 'justly and fairly' with persons is also very broad and easily abused; as is the requirement that programming must be "consistent with the maintenance of law and order"; instead, it would be better if the draft Act more specifically required broadcasters to refrain from broadcasting material likely to encourage or to incite the commission of crime. Similarly, the requirement on news and current affairs output to be 'truthful and accurate' is easily misinterpreted as an absolute obligation on such programmes to provide 100% true and accurate programming – needless to say, such a requirement would be impossible to fulfil.

We suggest that the use of all of these terms is dropped in favour of more precise language. We refer to modern broadcasting legislation, such as the UK Communications Act of 2003, and the codes that have been adopted pursuant to that legislation, as an example of how the wording of the draft Act can be improved in this regard. It requires, for instance, that news is reported with "due accuracy"[28] – a standard that is subtly but significantly different from requiring news to be "accurate". Another way of phrasing this obligation would be to require that newscasters should "strive for" accuracy in their reporting.

We are also concerned that of the functions of the Commission listed in Clause 13, the only one that substantively relates to media content are the first and last ones: that the Commission should "encourage media in the Cook Islands to reflect and develop Cook Islands identity and indigenous culture" and that it should monitor the extent to which the media "comply with community standards and expectations". We believe that this last functions is too vague to serve as a meaningful statement of the Commission's functions, primarily because the meaning of the term "community standards and expectations" is insufficiently clear. And while the promotion of local content and culture is not in itself an unsuitable function for a broadcast regulator, we are struck that there is no overriding requirement on the Commission to protect and promote the public's right to receive information from a variety of sources and on a diverse range of matters. We are also struck that the only mention to broadcasters' right to freedom of expression is in Clause 14, where the emphasis is on the exceptions to the right rather than protection of the right itself. Protection of broadcaster's right to freedom of expression and the public's right to a diverse and pluralistic media should be among the two key functions of any media regulator.

Recommendations:

- The Media Commission should have no regulatory or other powers over the internet or print media.
- The draft Act should list protecting freedom of expression and the public's right to a diverse and pluralistic media as among the key functions of the Media Commission.
- The use of vague terms such as "good taste and decency" and "community standards and expectations" in media content standards should be avoided.

[28] See Section 319(2)(d) of the Communications Act 2003.

- The media content standards should not place an absolute obligation on media outlets to provide fully truthful and accurate news but instead require that broadcasters "strive for" accuracy.

3.2. Enhancing the Independence of the Media Commission

The draft Act envisages that members of the Board of the Commission will be appointed by the relevant minister. Under Clause 4, the minister would appoint two members in his own discretion – one of them would be a lawyer and would also serve as the Commission's chair; and he would appoint one each from three to five nominees put forward by broadcasters, publishers and members of the chamber of commerce respectively. The draft Act does place certain conditions on who may become a member of the board, for example to require that they have relevant skills and to prevent conflicts of interest, but it fails to require that the members themselves or the board as a whole should function as an independent body.[29] Clause 16 stipulates that the Commission ""shall have regard to any policy directions conveyed to it by the Minister in writing and which are not inconsistent with the functions or powers of the Commission as prescribed by this Act", although any such government instructions must be published in the Commission's following annual report.

Analysis and comment

We are extremely concerned that as envisaged, the Commission will effectively function as an executive arm of government. There is nothing in the draft Act to protect the independence of the board or its members, who are ministerial appointees on a short leash – their term of office is only three years[30] – and the Commission is required to comply with any directives received from the government save for those that truly and clearly fall outside the scope of its powers and functions.

This breaches the internationally recognised requirement that any bodies which exercise regulatory or other powers over broadcasters and other media must be independent from government, politics or business interests. This principle has been explicitly endorsed in a number of international instruments, including the Joint Declaration by the UN, OAS and OSCE special mandates on freedom of expression referred to earlier and a specific Recommendation from the Council of Europe's Committee of Ministers. Central to both is the idea that regulatory bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, and which includes guarantees against dismissal and rules on conflict of interest.[31]

The Council of Europe's Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector may be taken as an example of international best practice in this area. It states, in Chapter II of the Appendix:

> 3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be

[29] In fact, the draft Act does not even use the word 'independent' or 'independence' in regard to the Commission or its members.
[30] See Clause 5.
[31] Articles 3-8 of the CoE Recommendation and Principle 13 of *Access to the Airwaves*.

> defined so as to protect them against any interference, in particular by political forces or economic interests.
>
> 4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
>   - regulatory authorities are under the influence of political power;
>   - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
>
> 5. Furthermore, rules should guarantee that the members of these authorities:
>   - are appointed in a democratic and transparent manner;
>   - may not receive any mandate or take any instructions from any person or body;
>   - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.
>
> 6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
>
> 7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.
>
> 8. Given the broadcasting sector's specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence.

The 2003 Joint Declaration by the UN, OAS and OSCE specialised mandates for the protection of freedom of expression states simply:

> 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.[32]

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[33]

We therefore recommend that, at a minimum, the draft Act should require that both the Commission as a whole and its individual members serve independently and in the public interest. The following wording could be used:

[32] Adopted 18 December 2003.
[33] *Athukorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97, (1997) 2 BHRC 610.

> The Media Commission shall enjoy operational and administrative autonomy from any other person or entity, including the government and any of its agencies. This autonomy shall be respected at all times and no person or entity shall seek to influence the members or staff of the Media Commission in the discharge of their duties, or to interfere with the activities of the Media Commission, except as specifically provided for by law.[34]

In order to enhance their independence, Board members should serve for at least five years, and they should be appointed in an open and democratic process, with input from civil society. They should not be appointed by a member of the executive arm of government – such as a government minister – but rather by a multi-party democratic forum, and the Media Commission should not be required to follow policy directions conveyed to it by the minister. The Board as a whole should be reasonably reflective of Cook Islands society, and the Commission should have sufficient long-term funding to enable it to carry out its legitimate functions without undue pressure from the government. We refer to ARTICLE 19's own *Access to the Airwaves – Principles on Broadcast Regulation and Freedom of Expression*, which compiles best international practice in the area of broadcast regulation, for more detail on the relevant regulatory principles.

Recommendations:

- The draft Act should protect the independence of both the Commission as a whole and of its members.
- Board members should be appointed in an open and democratic process and by a multi-party democratic forum, with input from civil society.
- The Media Commission should not be required to follow policy directions conveyed to it by the minister.
- Board members should serve for at least five years.
- The Commission should have sufficient long-term funding to enable it to carry out its legitimate functions without undue pressure from the government.
- The Board as a whole should be reasonably reflective of Cook Islands society.

3.3. Miscellaneous

Criteria for the issue of a licence

Under Clause 19, a broadcasting licence may be refused if the Commission deems the applicant not to be a "fit and proper" person to hold such a licence. The meaning of the term "fit and proper" is not defined.

While we are aware that the term "fit and proper" is used in broadcasting laws in other countries, we are concerned that the term remains ill-defined. This means that the term is easily abused for political purposes, for example to refuse a licence to a person or company whose editorial line is likely to be critical of the government of the day. Our concerns in this regard are heightened by the close ties between the Media Commission and the government, which we criticise in Section 3.2 of this Memorandum.

Licence revocation

Clause 22 allows a licence to be suspended or revoked for any of six reasons:

(a) a breach of any provision of the Act or regulations made thereunder;

[34] Taken from ARTICLE 19's *Access to the Airwaves – Principles on Broadcast Regulation and Freedom of Expression*, London, 2001: http://www.article19.org/pdfs/standards/accessairwaves.pdf.

(b) a breach of a licence condition;
(c) failure within 3 months of the date on which it is due, to pay the licensee's annual licence fee or any penalty thereon;
(d) failure to commence carrying on broadcasting of the type specified in its licence within 3 months after the issue of its licence;
(e) failure to carry on broadcasting of the type specified in its licence for a period exceeding 3 months; or
(f) on the written request of the licence holder.

Paragraphs (2)-(9) of clause 22 contain some procedural and fair process considerations to be followed by the Commission.

We are concerned that licence suspension or revocation is a very serious measure that should be taken only in response to serious and repeated breaches of key licence conditions, or important other statutory requirements, and only if lesser sanctions have failed to have an effect. For example, a broadcaster that incites to racial hatred and has been fined repeatedly for incitement to racial hatred could legitimately be stripped of its licence. The draft Act, however, fails to require either that the sanction should be proportionate, or that a graduated approach is followed. Thus, under the draft Act, a broadcaster could have its licence suspended for a failure to abide by a very minor licence condition – or, indeed, for a failure to abide by the very vague requirement in Clause 24 that broadcasts should be "in good taste". This would constitute a clear violation of the broadcaster's right to freedom of expression, which would however be legal under the draft Act so long as the procedural requirements of Clause 22 are complied with and the broadcaster is given proper notice and an opportunity to respond.

Recommendations:

- The draft Act should list exhaustively the detailed grounds on which a licence may be refused, rather than use the catch-all consideration of whether an applicant is "fit and proper" to hold a licence.
- The draft Act should require that any sanction that is imposed on a broadcaster for failing to abide by the law or its licence conditions is proportionate to the breach.
- The draft Act should require that sanctions are instituted in a graduated fashion.
- Licence suspension or revocation should be imposed only in response to a serious breach of a licence condition or the law, and only when lesser sanctions have failed to remedy the breach.