# Memorandum

on the draft

# Communications Bill of Namibia

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# 1. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS[1]

The Namibian government has recently published the latest version of its new Communications Bill. Consultation on this Bill, which intends to set up a single independent regulator for telecommunications, post as well as broadcasting, started as long ago as 2002; the current, undated, draft was received by ARTICLE 19 in July 2006. This Memorandum analyses this latest proposal against international standards on freedom of expression and broadcast regulation, and provides concerns and recommendations to aid future debate around the draft. Our focus is on the nature and functions of the proposed regulatory body, and on the regulation of broadcasting services.

According to its long title, the intention behind the Bill is to establish an *independent* regulatory authority for the entire communications sector. Our primary concern is that, as envisaged in the current draft of the Bill, the new 'Communications Authority' would in fact not be independent. Not only does the Bill fail explicitly to affirm the Authority's independence – save in the long title, the very word "independent" does not appear anywhere in the Bill in relation to the Authority – the Bill actively undermines any independence that the Authority might in practice have by requiring it to follow ministerial orders and by establishing the Minister for Information and Broadcasting as the sole person to appoint the Authority's members.

In addition, we have a number of other concerns:

- the Bill's failure efficiently to promote pluralism and the public's right to receive information from a variety of sources;
- the Bill's failure to recognise community broadcasting as an important third category of broadcasting, alongside public service and commercial broadcasting;
- the Authority would be able to issue entry warrants without any judicial authorisation; and
- there is no limitation to the fees that may be charged for broadcast licences, nor is there any recognition that certain types of broadcasters should benefit from a lower fee.

We recommend therefore that, at a minimum, the following amendments are introduced:

**To safeguard the independence of the Authority**

- The independence of the Authority should be explicitly guaranteed in the legislation.
- The process for appointing the members of the Board of the proposed Authority should be taken out of the hands of the responsible minister and entrusted to a publicly accountable body, such as a committee or subcommittee of Parliament. The appointments process should be required to be open and consultative.
- The rules of exclusion in Article 7 should be supplemented with provisions

[1] ARTICLE 19 is an international human rights organisation which defends and promotes freedom of expression and freedom of information around the world. We believe that freedom of expression and access to information is not a luxury but a fundamental human right. The full enjoyment of this right is central to achieving the full enjoyment of individual freedoms and to the healthy functioning of democracy; and it is a potent force to pre-empt repression, war and conflict.

disqualifying the appointment of anyone working in the service of the government, or anyone who holds an official office in, or is an employee of a political party.

- The length of service of members of the Board should be at least four years, but no longer than six.
- The Authority should not be required to follow ministerial orders.

**To promote pluralism and freedom of expression**

- The promotion of pluralism and safeguarding of both broadcasters' right to freedom of expression and the public's right to an open, independent and pluralistic communications sector should be guiding principles in the legislation.
- The Bill should recognise the importance of public service broadcasting and community broadcasting alongside private, commercial broadcasting.

**To promote community broadcasting**

- Community broadcasters should benefit from a reduced licence fee, or from a licence fee waiver.
- Consideration should be given to setting up a fund to subsidise community broadcasting.
- The national broadcasting plan should set aside spectrum for community broadcasting use.

**Regarding licence applications**

- The Authority should be required to provide written reasons for the grant or refusal of a licence. Licence holders should benefit from a presumption of renewal.
- The Bill should clarify that licence applications may be made in the absence of a formal tender.
- Vague and subjective considerations, such as those stated in Clause 66(5) and Clause 69(6)(a), should be redrafted as clear and unambiguous rules.
- Clause 69(6)(c) should be removed and replaced with clear rules to prevent the emergence of monopolies and oligopolies in the broadcasting sector.
- Clause 71 should require that sanctions must be proportionate to the violation, and that licences may be suspended or revoked only if lesser sanctions have been imposed but have failed to remedy the breach.

**On the right of reply**

- The Bill should differentiate between a correction or rectification to be broadcast by the broadcaster concerned, and a full "counter-version". A "counter-version" should be available only when a simple rectification would not suffice to repair the harm done by the broadcast of the false assertion or statement.
- Only a person whose rights have been directly affected by the broadcast of a false statement may demand a rectification or "counter-version".
- The Bill should require that a "counter-version" may not introduce new issues or comment on correct facts.

**Regarding the broadcasting fee**

- The broadcasting fee should not be set at such a level as to handicap or deter broadcasters, in particular community broadcasters. Generally, the fee should not be set at a higher level than that necessary to secure the running of the Authority, bearing in mind its income from other sources.

**Regarding entry and search warrants**

- The Authority should not have the power to issue entry and search warrants.

The following Sections of this Memorandum elaborate on these concerns and recommendations. Section 2 briefly outlines relevant international standards on freedom of expression and broadcasting; Section 3 analyses the Bill against these standards.

# 2. INTERNATIONAL STANDARDS

## 2.1. The Importance of the Right to Freedom of Expression

The right to freedom of expression occupies a central position in international law; not only because of its importance in its own regard but also because its enjoyment is central to fulfilling other rights and realising democracy. International law therefore affords freedom of expression strong protection. In its very first session, the United Nations General Assembly adopted a resolution stating that "[f]reedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated."[2]

Freedom of expression was also incorporated in the *Universal Declaration on Human Rights* (UDHR),[3] which was adopted as a United Nations General Assembly resolution in 1948. Article 19 of the UDHR 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.[4]

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a legally binding treaty ratified by Namibia in 1994, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. These guarantees allow for some restrictions on freedom of expression and information but only where these are prescribed by law, pursue a legitimate aim and are necessary in a democratic society to protect that aim.

Article 21(a) of Namibia's 1990 Constitution guarantees freedom of expression as follows:

[2] United Nations General Assembly Resolution 59(1), 14 December 1946. the General Assembly here refers to 'freedom of information' in its widest sense, as the free flow of information.
[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[4] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[5] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

> All persons shall have the right to … freedom of speech and expression, which shall include freedom of the press and other media.

The importance of freedom of expression in a democracy has been stressed by national and international courts and tribunals around the world. For example, the UN Human Rights Committee has stated:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. … 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.[6]

Similarly, the Inter-American Court of Human Rights has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.[7]

This has repeatedly been affirmed by both the African Commission on Human and Peoples' Rights and the European Court of Human Rights.

The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements is well established. For example, the European Court of Human Rights has frequently reiterated that:

> [F]reedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[8]

These statements emphasise that freedom of expression is both a fundamental human right and also key to democracy, which can flourish only in societies where information and ideas flow freely.

## 2.2. Restrictions on Freedom of Expression

While freedom of expression is an important right, it is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the *International Covenant on Civil and Political Rights* lays down the benchmark, stating:

> 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:

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[6] See, for example, *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.
[7] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.
[8] *Nilsen and Johnsen v. Norway*, 25 November 1999, Application No. 23118/93, para. 43.

> (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. Accordingly, any restriction on this right must meet a strict three-part test, approved by both the Human Rights Committee[9] and the European Court of Human Rights.[10] This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure that interest.

The first requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[11] Second, the interference must pursue one of the aims listed in Article 19(3); the list of aims is an exhaustive one and thus an interference which does not pursue one of those aims violates Article 19. The third part of the test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessity". Although absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.[12] In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

### 2.3. Broadcasting Freedom and 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."[13]

Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

> [I]t is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[14]

This applies particularly to information which, although critical, relates to matters of public interest:

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all

[9] See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.
[10] See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, paras. 28-37.
[11] *Ibid.*, at para. 49.
[12] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.
[13] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *op cit.*, para. 34.
[14] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

> matters of public interest [footnote omitted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[15]

This protection applies to the broadcast media as it does to all other forms of media. While it does not imply that the media should be entirely unregulated, two key principles apply to broadcast regulation. First, it is well established that any bodies with regulatory powers in this area must be independent of government. Second, an important goal of regulation must be to promote diversity in the airwaves. These are a public resource and they must be used for the public benefit, an important part of which is the public's right to receive information and ideas from a variety of sources. Third, regulation is often a 'restriction' on editorial freedom, even if its purpose is to fulfil the public's right to receive information, and it must therefore pass the "necessity" test described in Section 2.2, above: any form of regulation that goes beyond what is "necessary" to achieve even a legitimate aim is suspect.

The ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, encapsulates a wide range of standards relevant to broadcasting, including all of the principles noted above.[16]

### *2.3.1. Independence of the Regulator*

The principle that bodies with regulatory powers in the area of broadcasting must be independent has been set out clearly by both national courts and international bodies. One of the clearest statements of the principle comes from a case decided by the Supreme Court of Sri Lanka, challenging the constitutionality of a draft broadcasting bill. The Court held that the bill was incompatible with the constitutional guarantee of freedom of expression, mainly because the draft bill gave the Minister 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."[17]

Clear statements on this principle have been made by official UN bodies as well as all three regional systems for the protection of human rights. The UN Human Rights Committee has expressed concern about restrictions on private broadcasting and lack of independence of regulatory authorities on a number of occasions in recent years. Perhaps the clearest statement was in its Concluding Observations on Lebanon's Second Periodic Report, where it expressed concern over a media law as follows:

> 355. The Committee therefore recommends that the State party review and amend the Media Law of November 1994, as well as its implementing decree, with a view to bringing it into conformity with article 19 of the Covenant. It recommends that the State party establish an **independent** broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences in accordance with reasonable and objective criteria.[18] [emphasis added]

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[15] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).
[16] ARTICLE 19 (London: March, 2002). See Principle 3 and Section 4.
[17] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.
[18] *Annual Report of the UN Human Rights Committee*, 21 September 1997, UN Doc. A/52/40.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stressed the need for independent regulation of broadcasting, stating:

> 16. There are several fundamental principles [relating to broadcasting] which, if promoted and respected, enhance the right to seek, receive and impart information. These principles are…laws governing the registration of media and the allocation of broadcasting frequencies must be clear and balanced; any regulatory mechanism, whether for electronic or print media, should be independent of all political parties and function at an arms-length relationship to Government….[19]

The *African Charter on Broadcasting 2001* was adopted by a UNESCO/MISA-sponsored conference, "Ten Years On: Assessment, Challenges and Prospects", celebrating the 10th anniversary of the Declaration of Windhoek on Promoting an Independent and Pluralistic African Press. The Charter states, under the heading General Regulatory Issues:

> 1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.
>
> 2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party….
>
> 5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.

This has found support in the recent adoption by the African Commission on Human and Peoples' Rights of a *Declaration of Principles on Freedom of Expression in Africa*. Paragraph 2 of Principle V, entitled Private Broadcasting, states:

> The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:
>
> - there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;
> - an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;
> - licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and
> - community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

Within Europe, the need for independent broadcast regulators finds strong support in a recommendation adopted recently by the Committee of Ministers of the Council of Europe, *Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector*.[20] The Recommendation includes a set of Guidelines regarding broadcast regulatory bodies, including the following statement:

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[19] Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 29 January 1999, UN Doc. E/CN.4/1999/64. See also Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 28 January 1998, UN Doc. E/CN.4/1998/40, para. 20, where the Special Rapporteur noted the need for independent regulatory frameworks for private broadcasters.

[20] Recommendation (2000) 23, adopted 20 December 2000.

> 1. Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.
>
> 3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

Similar statements have been made within the context of the Organization of American States.[21]

### *2.3.2. Promoting Pluralism*

It is now well established that international and constitutional guarantees of freedom of expression include the concept that it is only through a diverse and pluralistic media that the public's right to seek and receive information and ideas can be secured. The obligation to promote media pluralism incorporates both freedom from unnecessary interference by the State, as well as the need for the State to take positive steps to promote pluralism.[22] Thus, States may not impose restrictions which have the effect of unduly limiting or restricting the development of the broadcasting sector and, at the same time, States should put in place systems to ensure the healthy development of the broadcasting sector, and that this development takes place in a manner that promotes diversity and pluralism.

These obligations are of particular importance in light of the trend towards globalisation, including in the broadcasting sector. It is only through the development of a strong, free and pluralistic local media that local voices can be preserved in broadcasting against the growing dominance of multi-national media companies. The threat of international domination in this area is a particular threat in developing countries.

International law strongly supports the principle of pluralism in the media. The European Court of Human Rights has held in a series of judgments, starting with *Informationsverein Lentia v. Austria*,[23] that the promotion of pluralism is a key role for broadcast regulators:

> [Imparting] information and ideas of general interest, which the public is moreover entitled to receive…cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.[24]

The UN Special Rapporteur on Freedom of Opinion and Expression has stated, similarly:

> There are several fundamental principles which, if promoted and respected, enhance the right to seek, receive and impart information…a monopoly or excessive concentration of ownership of media in the hands of a few is to be avoided in the interest of developing a

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[21] See Principles 12 and 13 of the Inter-American *Declaration of Principles on Freedom of Expression*, adopted at the 108th regular session, October 2000. See also, *Access to the Airwaves*, *op cit.*, Principle 10.
[22] See *Access to the Airwaves*, *op cit.*, Principle 3.
[23] 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.
[24] Note 23, para. 38.

> plurality of viewpoints and voices… access to technology, newsprint, printing facilities and distribution points should only be regulated by the supply and demand of the free market.[25]

The *African Charter on Broadcasting 2001* includes a number of provisions stressing the importance of pluralism in broadcasting. Part I: General Regulatory Issues, states:

> 1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community….
> 5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content….
> 7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.[26]

Pluralism necessarily involves broadcasting by different entities and international and comparative statements on this clearly reflect the idea that open, if regulated, competition in the broadcasting sector, as in the print sector, should be the primary means of ensuring diversity. State broadcasting monopolies are therefore an unjustifiable restriction on freedom of expression.[27]

# 3. KEY PROBLEMS WITH THE BILL

Our overriding concern with regard to the Bill is that the independence of the proposed new 'Communications Authority of Namibia' is not guaranteed. We are also concerned that the Authority would be required to follow ministerial guidelines in its day-to-day work. Our other concerns include the Bill's failure efficiently to promote pluralism and the public's right to receive information from a variety of sources; the Bill's failure to recognise community broadcasting as an important third category of broadcasting, alongside public service and commercial; that the Authority would be able to issue entry warrants without any judicial authorisation; and that there is no limitation to the fees that may be charged for broadcast licences, nor is there any recognition that certain types of broadcasters should benefit from a lower fee.

The following paragraphs elaborate on these concerns.

## 3.1. Independence of the Communications Authority of Namibia

International law requires that any regulatory bodies with powers over the broadcasting sector should be absolutely independent from the government, and from political, commercial and other undue interests (see Section 2.3.1 of this Memorandum). We are very concerned that, as drafted, the Bill wholly fails to safeguard the proposed Authority's independence.

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[25] Report to the UN Commission on Human Rights, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 16.
[26] See also the ARTICLE 19 Measures, Recommendation 9.
[27] See, for example, *Capital Radio (Private) Limited v. The Minister of Information, Posts and Telecommunications*, Judgment No. S.C. 99/2000, Constit. Application No. 130/00 (Supreme Court of Zimbabwe).

Clause 4 of the Bill creates the Authority; but does not safeguard its independence. Under Clause 9, all members of the Board of the Authority would be direct ministerial appointees; and Clause 7 would require the Authority to follow ministerial guidelines in the exercise of its functions. These two clauses, together, would effectively put the Authority under direct ministerial control. This problem is exacerbated by Clause 11, which would fix the term of Board members to three years. This is a relatively short term which would make it easy for the appointing minister to replace members who do not perform 'satisfactorily'. The only two clauses that might go some way to safeguarding the Authority's independence – Clause 9(2), which sets minimum qualification and/or expertise and experience standards, and Clause 10, which sets out minimum standards to prevent conflicts of interest – are insufficient to achieve full independence.

ARTICLE 19's publication, *Access to the Airwaves*, sets out a number of principles on freedom of expression and broadcast regulation, drawn from our world-wide experience on best practice in this area. It recommends that the institutional autonomy and independence of a broadcast regulatory body should be guaranteed and protected by law, including specifically and explicitly in the legislation which establishes the body, and through the rules relating to membership of the board of the regulatory body. It suggests the following clause for inclusion in legislation:

> The [name of body] 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 [name of body] in the discharge of their duties, or to interfere with the activities of the [name of body], except as specifically provided for by law.[28]

It also recommends that members of the authority are appointed in such a way as to safeguard their independence:

> 13.1 Members of the governing bodies (boards) of public entities which exercise powers in the areas of broadcast and/or telecommunications regulation should be appointed in a manner which minimises the risk of political or commercial interference. The process for appointing members should be set out clearly in law. Members should serve in their individual capacity and exercise their functions at all times in the public interest.
>
> 13.2 The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation. Only individuals who have relevant expertise and/or experience should be eligible for appointment. Membership overall should be required to be reasonably representative of society as a whole.[29]

The South African model for appointing members to the Council of the South African communications regulator may be seen as an example of implementation of these principles. Section 5 of the Independent Communications Authority of South Africa Act, 2000, states:

> The Council consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles, namely-
> (a) participation by the public in the nomination process;
> (b) transparency and openness; and

[28] Note 16, Principle 11.
[29] *Ibid*., Principle 13.

> (c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.
> …
> (3) Persons appointed to the Council must be persons who-
> (a) are committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service; and
> (b) when viewed collectively-
> (i) are representative of a broad cross section of the population of the Republic; and
> (ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning, law, marketing, journalism, entertainment, education, economics, business practice and finance or any other related expertise or qualifications.
> (4) A councillor appointed under this section must, before he or she begins to perform his or her functions, take an oath or affirm that he or she-
> (a) is committed to fairness, freedom of expression, openness and accountability; and
> (b) will uphold and protect the Constitution and the laws of the Republic, including this Act and the underlying statutes.

Despite the formal role of the President in confirming appointments to the Council, the actual selection is entrusted to the National Assembly of South Africa. We strongly recommend that a similar appointments mechanism ensuring the independence of members of the Board of the proposed Authority in Namibia is found.

**Recommendations:**

- The independence of the Authority and of the members of its Board should be explicitly guaranteed in the legislation.
- The process for appointing the members of the Board of the proposed Authority should be taken out of the hands of the responsible minister and entrusted to a publicly accountable body, such as a committee or subcommittee of Parliament. The appointments process should be required to be open and consultative.
- The rules of exclusion in Article 7 should be supplemented with provisions disqualifying the appointment of anyone working in the service of the government, or anyone who holds an official office in, or is an employee of a political party.
- The length of service of members of the Board should be at least four years, but no longer than six.
- The Authority should not be required to follow ministerial orders.

## 3.2. Promotion of pluralism and the public's right to receive information from a variety of sources

The guiding principle in broadcast regulation should be to promote the public's right to receive information from a variety of sources, together with protection for broadcasters' right to freedom of expression (see Section 2.3.2 of this Memorandum). The Bill, as currently drafted, fails to promote this principle.

Clause 2 of the Bill sets out a number of 'objects' of the legislation that are to be followed by the Authority. These include requirements such as to promote technological innovation, to increase information services to all sectors of Namibian society, to encourage local participation in the communications sector, to stimulate use of the radio spectrum in line with Namibia's best interests and to advance and protect the interests of the public. We do not believe that this is sufficient to protect the public's right to a pluralistic media, or

broadcasters' right to freedom of expression. The Act should strongly require the Authority to have the promotion of a free, independent and pluralistic communications sector as its primary objective, together with safeguarding broadcasters' right to freedom of expression. We would again point to South Africa's ICASA Act, which requires the regulator to "regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society"[30].

The Bill's lack of explicit recognition of the importance of a pluralistic broadcasting and telecommunications sector is also reflected in the licensing process. For example, in the telecommunications sector, the Bill would still allow for a single provider to hold a monopoly (see Section 38(2)).

We are also struck by the lack of explicit recognition of the importance of public service broadcasting and community broadcasting, alongside private commercial broadcasting. Community broadcasting, in particular, is an important form of broadcasting that can help safeguard an equitable right of access to the airwaves and promote pluralism. The importance of community broadcasting has been recognised around the world, and in view of their not-for-profit status community broadcasters in many countries benefit from reduced or waived licence fees.[31] Some countries, such as the United Kingdom, have set up a specific fund to subsidise community broadcasting.[32] The national broadcasting plan should also set aside spectrum for community broadcasting use. The only mention of community broadcasting in the Bill is in relation to the licensing process, which requires the Authority to prioritise "community-based" broadcasts. While we welcome this requirement, we do not believe that it suffices on its own to promote community broadcasting.

**Recommendations:**

- The promotion of pluralism and safeguarding the both broadcasters' right to freedom of expression and the public's right to an open, independent and pluralistic communications sector should be guiding principles in the legislation.
- The Bill should recognise the importance of public service broadcasting and community broadcasting alongside private, commercial broadcasting.
- The national broadcasting plan should set aside spectrum for community broadcasting use.
- Community broadcasters should benefit from a reduced licence fee, or from a licence fee waiver.
- Consideration should be given to setting up a fund to subsidise community broadcasting.

## 3.3. Licensing process for broadcasters

The licensing process for broadcasters is outlined in Chapter VI of the Bill. Clause 66 sets out the licensing process and considerations for licence renewals; Clause 69 provides the same for new applications. While the process is generally straightforward, we are concerned that in several areas, it sets highly subjective standards. The following are of particular concern:

- Clause 66(5) requires the Authority to renew a licence unless "in its opinion, there is a good reason to refuse to renew the licence in question". We are concerned that this

[30] ICASA Act 2000, Section 2.
[31] See, for example, Section 32 of South Africa's Broadcasting Act 1999; and the UK's Community Radio Order 2004, Statutory Instrument 2004 No. 1944.
[32] See http://www.ofcom.org.uk/radio/ifi/rbl/commun_radio/Communityfund/.

formulation is open to abuse; the Bill should establish a presumption of licence renewal, and state a set of explicit and exclusive reasons on the basis of which the Authority may depart from this presumption;
- There appears to be no requirement on the Authority to provide written reasons for refusal of a broadcast licence. This contravenes a basic rule of administrative justice and would make it very difficult for an unsuccessful applicant to challenge the Authority's decision in court;
- Clause 69(6)(a) requires the Authority to have regard to "the character of the applicant or, if the applicant is a body corporate, the character of its directors" in deciding whether to grant a licence. This sets a highly subjective standard and should be dropped; and
- Clause 69(6)(c) requires the Authority to have regard to "the desirability or otherwise of allowing any person or association of persons, to have control of or a substantial interest in" owning more than one broadcasting service. While we welcome provisions to prevent the emergence of broadcasting monopolies or oligopolies, we believe that the standard set in this Clause is vague and subjective. Instead, the Bill should provide explicit rules to limit cross-media ownership and ownership of multiple broadcast media outlets (for example, limiting possession of national television broadcasting licences to one per licence holder). However, limits should not be so strict as to discourage investment in the broadcasting sector. For example, a company that owns a national television broadcast licence should also be permitted to hold a national radio broadcasting licence, as well as broadcasting licences in different cities. It should not, however, be permitted to hold multiple national television broadcasting licences.

It is also not clear from the Bill whether the Authority will issue tenders for the provision of broadcasting services, as is the case in the telecommunications sector, or whether interested persons can submit applications in the absence of a formal tender. We recommend that both should be possible.

Finally, Clause 71 of the Bill provides that a licence may be terminated or suspended for breach of the law or of a licence condition. While we recognise that licence suspension may be an appropriate response to multiple violations of, for example, hate speech provisions, such a severe sanction should be imposed only as a last resort, when other sanctions have been tried and have failed to have an effect. The Bill fails to require implementation of this principle of proportionality in sanctioning.

**Recommendations:**
- The Authority should be required to provide written reasons for the grant or refusal of a licence. Licence holders should benefit from a presumption of renewal.
- The Bill should clarify that licence applications may be made in the absence of a formal tender.
- Vague and subjective considerations, such as those stated in Clause 66(5) and Clause 69(6)(a), should be redrafted as clear and unambiguous rules.
- Clause 69(6)(c) should be removed and replaced with clear rules to prevent the emergence of monopolies and oligopolies in the broadcasting sector.
- Clause 71 should require that sanctions must be proportionate to the violation, and that licences may be suspended or revoked only is lesser sanctions have been imposed but have failed to remedy the breach.

## 3.4. Right of reply

Clause 72 provides for a right of reply, or "counter-version". This provides that any person who has been "affected by" the broadcast of a false statement, and who has a direct interest in that false statement, has a right to demand the broadcast of a "counter-version".

Under international law, the right of reply is a controversial issue and a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose rights have been harmed by the publication of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence.

Because of its intrusive nature, in the United States a mandatory right to reply with regard to the print media has been struck down as an unconstitutional interference with the First Amendment right to free speech. In *Miami Herald Publishing Co. v Tornillo*, the Supreme Court held:

> [A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[33]

On the other hand, the *American Convention on Human Rights*, covering the entire continent, requires States to introduce a right of reply[34] and in Europe, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe,[35] while many countries guarantee some form of a right of reply in law.[36] However, a legally enforceable right of reply constitutes a restriction on freedom of expression as it interferes with editorial decision-making.[37] As such, it must meet the strict three-part test set out above and a number of minimum requirements should apply.

A right of reply is quite different from a right of correction or refutation, which are normally limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material. A right of reply, on the other hand, requires the publication to grant space to an individual whose rights have been harmed by a publication based on erroneous facts, to 'set the record straight'. As such, it is a more intrusive interference with editorial freedom than the right to correction. As set out in the draft Law, however, a right of retractions is somewhere between these two, apparently being limited to retracting the information but allowing for direct access by the complainant to present the retraction.

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[33] 418 U.S. 241 (1974), p. 258.
[34] Note **Error! Bookmark not defined.**, Article 14. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).
[35] Resolution (74) 26 on the Right of reply – position of the individual in relation to the press, adopted on 2 July 1974.
[36] This is the case, for example, in France, Germany, Norway, Spain and Austria.
[37] See *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

ARTICLE 19, together with other advocates of media freedom, suggests that a right of reply should be voluntary rather than prescribed by law. In either case, certain conditions should apply, namely:[38]

(a) A reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader/viewer doesn't like or that simply present the reader/viewer in a negative light.
(b) A reply should not be available where a correction or refutation suffices.
(c) A reply should receive similar, but not necessarily identical prominence to the original article.
(d) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
(e) The media should not be required to carry a reply which is abusive or illegal.
(f) A reply should not be used to introduce new issues or to comment on correct facts.

Set against these standards, we have some concerns about the proposed right to reply scheme in the Bill.

First, according to Clause 72, any person who has merely been "affected by" and who has a "direct interest" in rectifying a false assertion or statement may demand a right of reply. We do not believe this can be justified; only persons whose *rights* have been affected by a false statement should be provided with a remedy.

Second, the Bill does not differentiate between a rectification to be offered by the broadcaster concerned, and a full "counter-version" (which we take to mean a form of access to airtime). In many cases, a simple rectification will suffice to repair harm done by the broadcast of the false statement and this should be recognised in the Bill.

Third, the Bill does not require that the "counter-version" to refrain from introducing new issues or commenting on correct facts.

**Recommendations:**

- The Bill should differentiate between a correction or rectification to be broadcast by the broadcaster concerned, and a full "counter-version". A "counter-version" should be available only when a simple rectification would not suffice to repair the harm done by the broadcast of the false assertion or statement.
- Only a person whose rights have been directly affected by the broadcast of a false statement may demand a rectification or "counter-version".
- The Bill should require that a "counter-version" may not introduce new issues or comment on correct facts.

## 3.5. Miscellaneous

A number of other matters in the Bill warrant attention. We draw particular attention to the following.

Broadcasting licence fees

[38] See also the conditions elaborated in Resolution (74)26, note 35.

Under Clauses 23 and 65, the Authority has full discretion in setting the level of the licence fee. We are concerned that this level should not be set at such a level as to deter prospective broadcasters from applying for a licence, and in particular community broadcasters. In Section 3.2, above, we have recommended that community broadcasters should benefit from a reduced licence fee or even from a waiver; here, we would recommend that the fee should not be set at a level higher than is necessary to secure the running of the Authority, bearing in mind its income from other sources.

Entry and search warrants

Under Clause 106, the Authority has the power to issue a warrant for entry and search of any premises, except for dwellings.

We are concerned that this Clause would violate the right to privacy, which under international law extends to business places, as well as the right to freedom of expression if used with regard to media premises.[39] It is a fundamental principle in democracies around the world that entry and search warrants are only issued on judicial authority; and that where a warrant is issued with regard to media premises, extra care is taken to ensure that journalistic privilege is not breached.[40] We recommend that Clause 106 is redrafted accordingly.

**Recommendations:**

- The broadcasting fee should not be set at such a level as to handicap or deter broadcasters, in particular community broadcasters. Generally, the fee should not be set at a higher level than that necessary to secure the running of the Authority, bearing in mind its income from other sources.
- The Authority should not have the power to issue entry and search warrants.

[39] *See* the European Court of Human Rights' decision in *Roemen and Schmit v. Luxembourg*, 25 February 2003, Application no. 51772/99.
[40] *Ibid.*