MEMORANDUM

on the

Malaysian Draft Media Council Act, 2002

and the

Media Council (Procedure for Inquiry) Regulations

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses Malaysia's draft Media Council Act (draft Act) for compliance with international standards on freedom of expression. The draft Act has been drafted by the Malaysian Press Institute and is likely to be placed before Parliament sometime this year.

II. International and Domestic Obligations

II.1 The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[1] 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.[2]

The *International Covenant on Civil and Political Rights* (ICCPR),[3] 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 Malaysia has neither signed nor ratified the ICCPR, it is nonetheless an authoritative elaboration of the rights set out in the UDHR and hence of some relevance here.

Freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights* (ECHR),[4] Article 13 of the *American Convention on Human Rights*[5] and Article 9 of the *African Charter on Human and Peoples' Rights*.[6]

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 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."[7] 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

[1] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[2] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit)
[3] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976. The ICCPR had been ratified by some 149 States by December 2002.
[4] Adopted 4 November 1950, in force 3 September 1953.
[5] Adopted 22 November 1969, in force 18 July 1978.
[6] Adopted 26 June 1981, in force 21 October 1986.
[7] 14 December 1946.

> disseminate information and opinions about the activities of elected bodies and their members.[8]

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives, as is clear from the following statement:

> 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'.[9]

Freedom of expression has a double dimension; it refers not only to imparting information and ideas but also to receiving them. This is explicit in international guarantees of freedom of expression such as that found in the *Universal Declaration of Human Rights*, quoted above, and has also been stressed by international courts. The Inter-American Court of Human Rights, for example, has stated:

> [T]hose to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas.[10]

II.2 Media Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law,"[11] stating:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[12]

The media merit special protection in part because of their role in informing the public and in acting as watchdog of government:

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[8] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.

[9] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights). Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

[10] *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.

[11] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

[12] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] … it is nevertheless incumbent upon it to impart information and ideas 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 by unable to play its vital role of "public watchdog".[13]

II.3 Independence of Media Bodies

It is well-established that bodies with regulatory control over the media must be independent of government, particularly where they exercise significant regulatory powers. Constitutional courts in several countries have affirmed this point. For example, the Supreme Court of Sri Lanka, faced with a Bill providing for a Broadcasting Authority, some of whose members would be government appointees, stated:

> Since the proposed authority, for the reasons explained, lacks independence and is susceptible to interference by the minister, both the right of speech and freedom of thought are placed in jeopardy…We are of the opinion [that the bill's provisions] are inconsistent with … the Constitution.[14]

It can be argued that even a mere suspicion of improper interference suffices to cast doubt on constitutionality. As Lord Denning MR explained:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people.[15]

In the hallowed phrase, "justice must not only be done, it must also be seen to be done".[16]

ARTICLE 19 has adopted a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*.[17] These Principles are based on international and regional legal standards, evolving State practice (as reflected, *inter alia*, in national laws and judgments of national courts), and the general principles of law recognized by the community of nations.[18]

Principle 10, which is applicable to all forms of media regulation, states:

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[13] See *Castells v. Spain*, note 12, para. 43, *Thorgeirson v. Iceland*, note 11, para. 63, *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, 14 EHRR 153, para. 59 and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 65 (European Court of Human Rights).

[14] *Athukorale and others v. Attorney-General*, 5 May 19978, 2 BHRC 609.

[15] *Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon*, [1969] 1 QB 577, p. 599.

[16] For the application of this maxim see, for example, *Locabail (UK) Ltd v. Bayfield Properties Ltd and another*, [2000] 1 All ER 65; *A.M.&S. Europe Ltd v. the Commission*, [1983] 1 All ER 705; and *Maynard v. Osmond*, [1977] 1 All ER 64.

[17] (London: ARTICLE 19, April 2002).

[18] See, for example, Recommendation (2000) 23 on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, adopted 20 December 2000 by the Committee of Ministers of the Council of Europe.

> All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law….

II.4 Restrictions on the Right to 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, any limitations must remain within strictly defined parameters. The universally accepted standard for restrictions is set by Article 19(3) of the ICCPR, which states:

> The exercise of the [right to freedom of expression] 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.

This article subjects any restriction on the right to freedom of expression to a strict three-part test, requiring 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 this interest.[19]

The third part of this 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.[20] As has been noted:

> '[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".[21]

II.5 Constitutional Guarantees

Article 10 of the Constitution of Malaysia states:

> (1) Subject to Clauses (2), (3) and (4) -
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (2) Parliament may by law impose -

[19] For an elaboration of a very similar test in the ECHR, see *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123 (European Court of Human Rights), paras. 28-37.

[20] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245 (European Court of Human Rights), para. 62. These standards have been reiterated in a large number of cases.

[21] *Ibid.*, para. 59.

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

...

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass laws prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

Although this guarantee does provide some protection for freedom of expression, it fails to meet the three-part test for restrictions on freedom of expression. Some of the grounds for restricting freedom of expression under the Constitution, such as friendly relations with other States and protecting the privileges of Parliament, are not recognized as legitimate purposes under international law. Article 10(2)(a) provides for restrictions where the government deems them "necessary or expedient" to protect the listed interests. Expedient is a much lower standards than the international guarantee, which requires any restriction to be 'necessary'.

III. The Draft Media Council Act

ARTICLE 19 considers that the approach to media regulation adopted in the draft Media Council Act needs to be reconsidered and that a number of amendments should be made to the draft Act. At least for the print and online media, self-regulation is preferable to a statutory system, and statutory regulation of individual journalists is highly contentious. The draft Act fails to recognise the important differences between the print, broadcast and online media, which in almost all countries has led to a fundamentally different regulatory approach for each of these three sectors. In addition, the independence of the Council could be enhanced and the powers of this body should be more clearly circumscribed.

III.1 Overview of the Draft Act

The draft Media Council Act establishes a Media Council for Malaysia whose functions are stated to include drafting professional standards for the regulation of the media, enforcing the standards through a complaints process, helping maintain the independence of the media, and monitoring national developments that might impact on the free flow of information in Malaysia. Accompanying the draft Act is a set of Regulations that govern the complaints mechanism, and the procedures by which members of the public may file a complaint with the Council alleging a breach of professional standards and regarding the conduct, by the Council, of inquiries. The Council is also empowered by the draft Act to deal with complaints regarding the conduct of persons and organisations *toward* the media.

The purpose of the draft Act, as stated in the preamble, is to achieve self-regulation in the media sector, and to promote and improve "the standard of journalism of print, broadcasting, news agencies and online media in Malaysia," in accordance with Article 19 of the UDHR. Its twenty sections deal with the establishment of the Council, its membership, and the Council's powers and functions.

The establishment of the Media Council, a corporate entity, will be effective from a date set by the Federal Government.[22] Section 4 of the draft Act addresses the selection and composition of the 25-member Council. A Chairman will be nominated by a committee comprising the Presidents of both the Senate and House of Representatives,[23] the Chief Justice of the Supreme Court, and three editors nominated by the Malaysian Press Institute. The draft Act specifies that the person appointed as Chairman must have served in a capacity "not less than a Justice of the Appeals Court." The other members of the Council are to be nominated as follows:

- 12 members will be nominated in accordance with a procedure prescribed by the Council from among the chief editors or editors of print media, "working journalists",[24] and producers or editors of broadcasting stations and online media. Of these 12, two shall be from "mainstream" newspapers; two from tabloid or non-mainstream newspapers; two are to be working journalists other than chief editors; two producers or editors from broadcasting stations; two from the online media; and one editor from each of the provinces of Sabah and Sarawak.
- Two members shall be media owners or managers, one each from broadcasting and from the print sector.
- One member shall be the manager of a "news agency".[25]
- One member shall represent journalists' associations and unions.
- Eight members shall come from among "eminent" non-media persons, including four that have knowledge of or experience in the fields of science, education, and law. Of those four, two will be nominated by the Malaysian Universities Council of Vice-Chancellors, one by the Bar Council of Malaysia, and one by the Malaysian Medical Council. The remaining four members will be nominated by non-governmental organizations and interest groups.

The Chairman and the Council members, once nominated, will be appointed by the King (Yan DiPertuan Agong).[26] The Chairman will hold office for three years and the other members for two years.[27] A member can lose his or her seat on the Council if he or she is censured under the draft Act, or if he or she misses three consecutive meetings without

[22] Section 3.
[23] The Yang DiPertua Dewan Rakyat and the Yang DiPertua Dewan Negara.
[24] "Working journalist" is defined in section 2 as a person who "works with a newspaper organization on a permanent basis and receives his remuneration on a regular basis." Freelance journalists are excluded from this definition, and thus are deprived of its benefits and spared its obligations.
[25] Defined in section 2 as "a domestically incorporated and owned news organisation for the purpose of collating and dissemination of news, information, photographs and videos."
[26] Section 5.
[27] Section 6(i).

sufficient excuse.[28] The position of Chairman is full time, and will be paid such salary as Parliament deems appropriate. The other members are to receive such allowances or fees for attending meetings as may be prescribed.[29]

The work of the Council may be delegated to committees. The Council has the power to "co-opt" as committee members as many people as deemed necessary, and these do not have to be drawn from among Council members. Non-Council members may not, however, vote on committee issues.[30]

Council and committee meetings will follow rules of procedure as provided for by regulations drafted by the Council, in accordance with sections 9 and 20 of the draft Act. Vacancies on the Council will not invalidate proceedings.

Parliament may provide monies to the Council in the form of grants. No minimum amount of funding is provided for by the draft Act. Rather, the amount of any grant will depend on what Parliament considers necessary for the Council to carry out its functions.[31] Section 16 provides that the Council will have control over its own fund, and that monies contributed to the fund include whatever fees the Council may collect. There is, however, no other mention of fees in the draft Act.

Section 12 of the draft Act lists the Council's functions in detail, including:

> (i) To maintain the highest journalistic standards and to preserve freedom of the Malaysian press, broadcast and online media in accordance with Article 19 of the [UDHR];
> (ii) To consider, investigate, and deal with complaints about the conduct of the print, broadcast media and online media and the conduct of persons and organisations towards the media;
> (iii) To build up a code of conduct for newspapers, news agencies, broadcasting and online media and journalists in accordance with high professional standards;
> (iv) To ensure on the part of newspapers, news agencies, and broadcasting, online media and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship;
> (v) To keep under review developments likely to restrict the supply by and to the media of information of public interest and importance;
> (vi) To make representations concerning the freedom of the media on appropriate occasions to Government, public inquiries, and other organisations in Malaysia;
> (vii) [Deleted]
> (viii) To concern itself with the developments such as concentration of or other aspects of ownership of newspapers and news agencies and broadcasting which may affect the independence of the press;
> (ix) To do other such acts as may be incidental or conducive to the discharge of the above functions.

[28] Section 6(ii) and (iv).
[29] Section 7(i).
[30] Section 8.
[31] Section 15.

The Council thus has a broad remit, dealing not only with violations by the media of ethical and professional rules of conduct, but also acting to defend the interests of the media in matters affecting the development of the freedom of expression in Malaysia.

Section 13 empowers the Council to initiate an inquiry following the receipt of a complaint of media misconduct. The inquiry procedure is elaborated in the Regulations. Section 13 provides that an inquiry will be initiated only after the newspaper, news agency, broadcasting station, editor or journalist, has had an opportunity to be heard by the Council. If, following an inquiry, a case is decided in favour of the complainant, the Council may, for reasons recorded in writing, "warn, admonish or censure" the offending media outlet, or "disapprove the conduct" of the editor or journalist. The Council may also order any newspaper to publish, "in such manner as the Council may think fit", the details of the inquiry.[32] The Council is prohibited from inquiring into any matter in relation to which proceedings are already pending before a court of law.[33]

For the purposes of conducting an inquiry under section 13, section 14 of the draft Act grants the Council the same procedural powers as a civil court, namely to summon witnesses, to require the discovery of documents, to receive evidence and affidavits, to requisition public records, and to issue commissions for the examination of witnesses. Every inquiry is to be treated as a judicial proceeding, although there is no mention of a right of appeal from a decision of the Council.

Section 16 of the draft Act states that the Council shall prepare an annual budget, showing receipts and expenditures, that will be forwarded to the Federal Government. The provision also imposes a duty on the Council to prepare an annual report, the contents of which are to include a summary of the Council's activities and an account of "the standards of newspapers, news agencies and broadcasting stations and factors affecting them." The annual report must be presented to Parliament. The provision also requires that the accounts of the Council be maintained and audited in a manner to be prescribed in consultation with the Auditor General of Malaysia.

Finally, the Council is granted the power to make its own regulations regarding the procedure for conducting Council and committee meetings, the terms and conditions of service of employees appointed by the Council (these regulations, however, must first be approved by the Public Services Department), the procedure for holding an inquiry under the draft Act, the delegation to the Chairman or Secretary of the Council any of its powers, and "any other matter for which provision may be made by regulation under this Act."[34]

[32] Section 13(ii).
[33] Section 13(iii).
[34] Section 20.

III.2 Analysis of the Draft Act

Statutory Councils

ARTICLE 19 generally recommends that, wherever this is a realistic possibility, self-regulatory bodies for the media should be preferred over statutory bodies. Few democratic countries impose statutory regulation on the media as a whole, and in particular on the print media, although such regulation is not unknown. It is generally recognised that it is not appropriate for the media to be 'policed' by statutory regulatory bodies, although the limited powers of sanction provided granted to the Malaysian Media Council by the draft Act are certainly not criminal in nature.

The test of necessity, discussed in the section on international and constitutional standards above (paragraph II.4), means that where the government interferes with the right to freedom of expression, it should choose the least restrictive means available. Self-regulation, which is one of the least restrictive forms of media regulation, has proved highly successful in a number of countries, particularly in relation to the print media. It is not only less restrictive for freedom of expression, but it promotes a more positive and promotional approach to ethics, and so is actually more effective. A self-regulatory approach tends to ensure a smoother functioning of the sector by establishing a climate of dialogue, openness and trust in dealings with the media.

The Malaysian Media Council, as conceived by this draft Act, is clearly not a self-regulatory body, despite the reference to this in the preamble.

Recommendation:

- Consideration should be given to allowing the media to establish a self-regulatory system before regulation is imposed by statute.

Scope of the Draft Act

There are serious problems with the scope of the draft Act, in terms of its definition of a newspaper, as well as in its application to online media and individual journalists.

A newspaper is defined as a news organisation that publishes material on a periodical basis. There should at least be some minimum requirement in the definition regarding scope of distribution. In a case from Belarus, the UN Human Rights Committee held that to require a publication with a circulation of just 200 copies to register was a breach of the right to freedom of expression. To the extent that regulation is legitimate, it is so only in relation to the mass media not, for example, pamphlets or other small-scale distributions.

The draft Act defines "online media" as "a news organisation that publishes reading materials on a daily basis or periodically through the medium of computer network or internet". There are serious problems with trying to include online media within the same

regulatory framework as other forms of media, and it is widely recognised that the very different nature of these media mean that different forms of regulation are warranted. Consideration should thus be given to removing online media altogether from the scope of the draft Act.

In any case, the definition of online media in the draft Act is extremely broad, and would, for example, extend to regularly updated personal websites. Our primary recommendation is that online media not be covered by the Act but, if they are included, it is essentail that the scope be restricted to bodies which are effectively mass media outlets.

It is important to distinguish between the regulation of media outlets, where a statutory council may still meet the standards of respect for freedom of expression established under international law, and regulation of media practitioners – referred to in the draft Act as working journalists – where it is widely accepted that statutory regulation of ethics is not legitimate. Professional ethics should not be the subject of statutory regulation.[35] Insofar as the Malaysian Media Council has the power to impose professional regulation on individual journalists, the draft Act is not consistent with international law.

Recommendations:

- The definition of a newspaper should ensure that the draft Act applies only to the mass media and not to small-scale distributions.
- Consideration should be given to removing online media from the scope of the draft Act. If, contrary to our recommendations, these media are included, the scope of coverage should at least be restricted to online mass media.
- The regulatory scope of the draft Act should not extend to media professionals, but be restricted to media outlets.

Independence of the Media Council

It is now well established that any body with regulatory powers over the media must be independent and protected against government or commercial interference. Although the draft Act does imply that the Council is to be independent of the government,[36] the independence of the Council and of its members could be further strengthened.

Principle 10 of *Access to the Airwaves* states:

> [The] institutional autonomy and independence [of regulatory bodies] should be guaranteed and protected by law, including in the following ways:
>
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
> - through the rules relating to membership;
> - by formal accountability to the public through a multi-party body; and

[35] See, for example, *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59 (High Court of Zambia).
[36] See, for example, the preamble.

- in funding arrangements.[37]

The draft Act does not contain a specific guarantee that Council members should be free to carry out their work without economic or political interference. In other countries, legislation establishing broadcast regulatory bodies often include precisely such a guarantee.

Another way to ensure the independence of media regulators is through rules relating to the appointment of members. Members of any governing body that exercises powers in the areas of media regulation should be appointed in a manner that minimizes the risk of political or commercial interference.[38] The fact that the nominating committee for the Chairman, a key Council member, includes political representatives undermines the independence of the Council.[39] These problems could be mitigated through certain 'rules of incompatibility' applicable to members. In particular, no one should be appointed who is employed in the civil service or other branches of government or who holds an official office in, or is an employee of a political party, or holds an elected or appointed position in government.[40] These prohibitions should apply in addition to the conflict of interest rules found at clause 12 of the Regulations. Consideration should also be given to providing explicitly that all members should act in the public interest, rather than represent the sectoral interests which nominated them.

Consideration should also be given to including a more precise system for compensation for the Council members in the draft Act. Principle 13.6 of *Access to the Airwaves* states: "The rules relating to reimbursement should be set out clearly in law in a manner that does not allow for discretion in relation to individual members." The Chairman's salary is to be determined by Parliament. Consideration should be given to linking it to judicial salaries (for example, setting it at the level of a Justice of the Appeals Court); this would be consistent with the professional requirement of experience as a judge. Consideration should also be given to indicating more precise guidelines for the reimbursement of Council members for attending meetings.

Setting clearer procedural rules, either in the draft Act or the Regulations, would also enhance the Council's independence and prevent potential abuse of process, for example by the Chairman. Rules regarding quorum, voting procedures and notice of meetings are examples of procedural rules which should be included.

The Regulations are in places quite vague regarding procedure and even regarding substantive reasons for decision-making. For example, clause 5 allows the Chairman to dispense with the inquiry process where he or she is of the opinion that, "there is no sufficient ground" for holding one. Even in this case, the Council may pass whatever order it sees fit. Criteria for dispensing with an inquiry should be set out to confine the unnecessarily broad discretion presently granted to the Chairman.

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[37] Note 17.
[38] *Access to the Airwaves*, Note 17, Principle 13.1.
[39] Section 4(2).
[40] See *Access to the Airwaves*, Note 17, Principle 13.3.

Finally, the Council appears to be largely dependent on Parliamentary discretion for its funding.[41] Principle 17 of *Access to the Airwaves* states, as part of the guarantee of the independence of regulatory bodies: "The framework for funding and for decisions about funding should be set out clearly in draft Act and follow a clearly defined plan rather than being dependent on *ad hoc* decision-making. Decisions about funding should be transparent and should be made only after consultation with the body affected." Consideration should be given to a clearer funding arrangement. For example, the draft Act could specify a minimum level of support that needs to be provided. Alternatively, provision could be made for funding by media bodies themselves.

Recommendations:

- The independence of the Council should be explicitly guaranteed in the draft Media Council Act.
- Political figures should not play a role in the appointment of the Chairman of the Council.
- Clear rules of political incompatibility for Council members should be introduced into the draft Act, along with a requirement that members act at all times in the public interest.
- The compensation scheme for the Chairman and members of the Council should be more clearly defined in the draft Act.
- The draft Act should be amended to include more detailed procedural rules relating to the Council and to further confine its discretion.
- Consideration should be given to providing for a more precise, and less politically dependent, funding framework for the Council.

Powers of the Council

The Regulations state, at clause 3(1), that a complaint may be based on the publication or non-publication of any "matter".[42] ARTICLE 19 is of the view that under no circumstances should the media be sanctioned for the non-publication of information, outside of very limited cases, for example relating to the right of reply, which are specifically provided for in legislation which satisfies the three-part test for restrictions on freedom of expression. This is particularly problematical given that neither the draft Media Council Act nor the accompanying Regulations specify under what circumstances the media might have an obligation to publish. The issue is further confused by the by the fact that, as defined by the Regulations, for something to constitute a "matter" for the purposes of lodging a complaint, it must have been published.

Section 12(iii) of the draft Media Council Act states that one of the Council's functions is to draft a media code of conduct in accordance with high professional standards. The Council is also charged with launching inquiries related to violations of the code of conduct, and censuring those members of the media that are found to have committed an infringement of the code. However, the draft Act does not provide any further guidance

[41] Section 15.
[42] See, for example, clause 3(1), setting out the grounds for a complaint.

regarding how the code should be drafted or what subjects it might regulate, although section 13 empowers the Council to censure any media that has "offended against the standards of journalistic ethics or public taste."

Any system of applying sanctions to media for content they have disseminated, or indeed for their other activities, must meet the test for restrictions on freedom of expression. This implies that the grounds for breach are precise and unambiguous, and that they related to important public interests. The draft Act should make it clear that a media outlet may only be subject to sanction for breach of a pre-established code of conduct, not for vague concepts such as 'ethics' or 'public taste'. The code itself should meet minimum standards of clarity and legitimacy. The Council should be required to consult broadly with interested stakeholders before adopting any code, and to update and revise the code regularly, as necessary.[43]

There are also problems with the censure provisions contained in section 13 of the draft Act. Section 13(2)(ii) states that the Council, if it is of the view "that it is necessary or expedient in the public interest so to do", may require any newspaper to publish the details of an inquiry. It should be clear that only newspapers found to have breached the code of conduct may be imposed on in this manner.

The draft Act makes no mention of either the right to judicial review or appeal from a Council decision. Section 14(ii) of the draft Act states that, "every inquiry held by the Council shall be deemed to be a judicial proceeding." Principle 16 of *Access to the Airwaves* states that decisions of regulatory bodies which affect individuals should be subject to judicial review. The draft Act should make it clear that decisions of the Council are subject to judicial review.

Recommendations:

- All references to complaints based on the non-publication of material should be removed from the Regulations.
- The draft Act should make it clear that sanctions, including a requirement to publish information, may only be applied for breach of the code of conduct.
- Any code of conduct drafted by the Media Council should be clear and unambiguous in its wording, should be developed in close consultation with the media and other interested parties, and should be disseminated widely to the public.
- The draft Act should make it clear that decisions of the Council are subject to appeal and/or judicial review.

Public Accountability

Principle 15 of *Access to the Airwaves* states: "Regulatory bodies should be formally accountable to the public through a multi-party body, such as the legislature or a committee thereof. Regulatory bodies should also be required by law to produce a detailed annual report on their activities and budgets, including audited accounts. This annual report should be published and widely disseminated."

[43] *Access to the Airwaves*, Note 17, Principle 23.

The draft Media Council Act does require that the Council prepare a budget and annual report, and that its accounts be audited.[44] However, the Council is not required to disseminate these to the public; they need only be presented to Parliament. ARTICLE 19 considers public accountability to be an integral part of any regulatory scheme for the media. As such, the draft Act fails to provide sufficient opportunities for public oversight.

Recommendations:
- Section 16 should be amended to require that the Council's annual reports and budgets be widely disseminated to the public.

Overlap with Other Legislation

Section 13(3) of the draft Act prohibits the Council from inquiring into any matter which is the subject of proceedings pending in a court of law. The media in Malaysia is already heavily regulated by statutes such as the *Printing Presses and Publication Act*, the *Official Secrets Act*, the *Sedition Act* and the *Internal Security Act.* The *Communications and Multimedia Act, 1998,* subjects Malaysian broadcasters to a licensing regime and a complaints procedure administered by the Communications and Multimedia Commission.

If the draft Act is to improve respect for freedom of the media in Malaysia, it is essential that it limit, rather than supplement, the barrage of restrictions currently in place. Instead of the prohibition in section 13(3), the draft Act should provide that disposition of a matter by the Council would prevent the matter from being separately considered under any other law.

Recommendation:
- The draft Act should provide that final disposition of a matter under its provisions precludes the same matter from being considered under any other law.

[44] Section 16.