Note on the Draft Broadcasting Bill of the Maldives

March 2007

This Note summarises ARTICLE 19's main concerns with the draft Broadcasting Bill of the Maldives (draft Bill), a working English translation of which has been provided to us. We understand that this Bill is being revised; this Note is based on the version received by ARTICLE 19 on 6 March 2007. The recommendations and comments in the Note are based on international standards governing broadcast regulation and the essential underpinnings of democratic governance. The relevant international standards are contained in ARTICLE 19's publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (available at: http://www.article19.org/pdfs/standards/accessairwaves.pdf), which summarises international law and practice in this field, as well as drawing upon progressive models at a national level. The Note is intended as input into the process of drafting the Bill, with the goal of ensuring that it conforms as far as possible with international standards in this area.

We note at the outset that there are a number of positive features of the Bill, in particular the appointment of an independent Broadcast Commission to regulate broadcasting in the Maldives and of a governing board to run the public broadcaster. At the same time, we have a number of concerns with the approach taken in the Bill, as set out below.

Key Recommendations:

- Regulatory powers in the area of broadcasting should be exercised by an independent body – such as the Broadcast Commission – and not by a political figure – such as the Minister of Information.
- The independence of the Broadcast Commission and Board of the National Broadcasting Corporation (NBC) should be significantly enhanced.
- The content restrictions and system for applying them should be substantially revised. The points system should be abolished and the Minister should not have the power to impose sanctions. Instead, the Broadcast Commission should be tasked with developing a Code of Conduct for Broadcasters, in close consultation with interested stakeholders, and with applying that Code.
- A clear, fair and transparent system for awarding licences should be added to the legislation and the prohibitions on who may receive a licence should be

substantially relaxed.

- The numerous provisions in the draft Bill which grant the Minister or Commission undue power to interfere in the internal operations of broadcasters should be removed.
- In addition to enhancing its independence, the provisions on the NBC should be further developed so as to ensure it can operate as a true public service broadcaster including, among other things, by providing for secure, independent sources of funding and proper public accountability systems.

Powers of Broadcast Commission

A key concern with the draft Bill is that while it establishes a Broadcast Commission, its powers in most areas are merely recommendatory instead of executive, which is the case in other countries (see, in particular, section 20, setting out the powers of the Commission).

It is particularly concerning that a number of powers which ought to be exercised by the Broadcast Commission are given instead to the Minister. It is the Minister, who has the power to issue licences (see section 24) and it is the Minister, not the Commission, who has the primary power to impose sanctions on broadcasters for breach of the rules (see section 43). The Minster also exercises various other powers, such as resolving problems relating to stoppages due to circumstances beyond the control of the broadcasters (section 42); listing obligatory broadcasts (section 63); registering logos (section 66); and receiving complaints (section 77).

It is well established under international law that any bodies which exercise regulatory powers over the media should be independent of government. While we appreciate that the Bill does give an important consultative and recommendatory role to the Commission – all of the powers noted above may be exercised only after consulting with the Commission – the final decision lies with the Minister, who is obviously not independent of government. We recommend that all, or nearly all, of the powers given to the Minister by the draft Bill be transferred to the Commission.

Independence

It is clear from the means of establishing the Commission that it is intended to be insulated from government interference. At the same time, its independence could be significantly enhanced through adopting the following measures. First, its independence could be explicitly guaranteed in law, which is not presently the case.

Second, the process for appointments, while sharing power between the President and People's Majlis, could be further insulated from political control. Pursuant to section 6(b)(2), it would appear that the President proposes names to the People's Majlis, who then approve them and then refer them back to the President for formal appointment. It would be preferable if any citizen could propose members which the President is required to assess according to a set of objective criteria.

Also, the process should be required to be conducted in a transparent fashion so that any irregularities will be apparent. We note that both of these rules are applicable to appointments to the Board of the public broadcaster (see below). The draft Bill provides for the President of the Republic to appoint the President and Vice-President of the Commission (see section 8). It would be both preferable and appropriate, given the need to ensure that the regulatory board is protected from political interference, for the Commission to make these appointments itself.

Third, security of tenure is not as strong as it could be. The term of tenure of members of the Broadcast Commission is only three years, which is short compared to the practice in other countries, and there is no apparent limit on reappointment (see section 7), whereas in many other countries an individual may only sit for two consecutive terms. The independence of members may be compromised if they are continually seeking reappointment. Furthermore, the President, with the consent of a two-thirds majority of the People's Majlis, may remove members for vague reasons such as being negligent or reckless, or having a conflict of interest. We consider that there is substantial scope for abuse of power and that it would be preferable if clear and narrowly-drafted grounds for removal were set out in the law. In minor cases of a conflict of interest, the affected member should be able to declare the interest and recuse him- or herself from consideration of the particular matter.

Finally, the People's Majlis sets the level of remuneration for members of the Commission. It would be preferable to link these to existing civil service rates of remuneration so as to avoid any possibility of abuse.

Content Restrictions

The draft Bill contains a number of rules relating to content. Two main systems apply. First, there is the broadcast licensing system. Section 30 provides for licences to be issued for one year, and for renewal to be automatic unless the number of points drops below 50, in which case the licence will not be renewed. Section 31 stipulates that the number of points and rules regarding point gain and loss will be set out in the licence, although these appear to be provided for in Annex Five. This Annex sets the number of points at 100 and provides for an additional grant of 100 points if six months have gone by without loss of points. It also contains 38 rules relating to loss of points, many involving restrictions on content.

Second, there are the express statutory prohibitions on specific types of content. Part 10 deals with broadcasting content and section 47, in particular, sets out a number of prohibitions on content. These rules would appear to be enforced through the power in section 43 of the Minister to impose sanctions ranging from orders to rectify to fines to licence revocation for breach of the law or regulations.

The content restrictions contained in both Annex Five and section 47, which largely overlap, are unduly vague and hence potentially overbroad. While most of the provisions

have some legitimate basis, their vagueness allows for a great deal of discretion in their application. This is inherently problematical and could lead to politically motivated application of the rules. Due to the potential threat of politically-motivated application of vague rules, international law only permits restrictions on freedom of expression which meet certain standards of clarity. The fact that the Minister holds a significant degree of regulatory power under the draft Law intensifies the prospect of illegitimate political interference.

In addition, both systems, as means of enforcing content rules, are of some concern. We consider the points system to be excessively harsh, unduly rigid and inappropriate to the framework of broadcast regulation. The system, at least as it appears, fails to take any account of the gravity of the breach and a small accumulation of minor breaches of the rules, indeed as few as two errors, can result in a loss of licence. Licence revocation (and non-renewal of a one-year licence is effectively the same thing) is the most intrusive sanction that can be applied to a broadcaster and should be used, if at all, only in the very most serious situations of repeated and flagrant breach of the rules. We are not aware of any democracy which employs a similar system to this.

The system of ministerial sanctions pursuant to section 43 is similarly problematical. As noted above, regulatory measures, including the application of sanctions, should not be imposed by a political figure but, rather, by an independent body. Although the system does envisage graduated sanctions, it does not provide for warnings, which is the lowest level and most common sanction in most broadcasting systems. It also fails to place conditions on the application of more stringent sanctions, and in particular licence suspension or revocation, which should be permitted only where less intrusive sanctions have failed to prevent the offending behaviour.

The section 43 system also incorporates a number of content restrictions which are not listed in Annex Five. Section 27(e), for example, prohibits the re-broadcasting of content that, among other things, "may bring diminution to the self-government". This would appear to apply to practically all broadcasting that was critical of government. This is not a legitimate content restriction for a democracy. Section 61 governs advertisements. No advertisement may impute imperfection to another's business material and no alteration may be made to advertisements when re-broadcasting material from abroad. Both of these run counter to established practice elsewhere. Critical or comparative advertising is perfectly legitimate as long as it is honest. In most cases, there is no point in keeping the advertisements in foreign re-broadcast material, as, for example, the products may not be available in the Maldives. Broadcasters will inevitably wish to replace these with local advertisements, and there is nothing wrong with this.

In most democracies, the system for ensuring quality and protecting against harmful broadcasting works rather differently from the model proposed for the Maldives. In these countries, the law sets out categories of material that need to be addressed – such as violence, protection of children, privacy and so on – but the actual rules relating to these categories are provided in a code of conduct developed by the independent broadcast regulator, in close consultation with broadcasters and other stakeholders. This allows for

far more detailed rules, which can treat difficult topics with greater precision than would be possible in primary legislation, and also for adaptation of those rules over time (for example, as new technologies change broadcasting or as new issues arise). The code is applied by the regulator, both through public complaints and direct monitoring. The primary goal is to clarify the boundaries of what is acceptable, not to punish those who operate outside of what are often quite unclear limits. In line with this, the vast majority of cases are resolved through a simple warning, although heavier sanctions may be applied for repeat or flagrant breaches.

Licensing

The draft Bill includes a number of prohibitions relating to licensing (see, for example, section 26) but it does not set out the positive criteria for obtaining a licence or for choosing between competing licence applications. At least outline rules on this should be set out in the primary legislation, which should ensure that the process is fair and transparent. A key criterion for deciding between competing licence applications should be contribution to broadcast diversity and the range of choices available to listeners and viewers.

Section 26 of the draft Bill sets out a long list of prohibitions on who may receive a licence. While some of these are legitimate, others are not and yet others are unduly rigid and/or limiting. Sections 26(h)-(l) prohibit companies with shareholders having committed various wrongs – such as being convicted of defamation or narcotics abuse, or of any criminal offence in the last two years – from holding a licence. These prohibitions are unnecessary to protect the public and significantly limit access to a broadcasting licence, as a result of which they are not found in broadcasting laws in democratic countries. Many very respectable journalists, for example, have fallen foul of the often very restrictive rules on defamation and this should in no way prohibit them from being a shareholder in a broadcasting company.

Many of the rules on ownership in section 26 are unduly restrictive. For example, only 100% Maldivian companies may receive a licence. Almost every other broadcasting regime allows at least some foreign ownership, as this can attract much needed resources – both financial and human – to the sector and also provide valuable networking opportunities. Similarly, the cross-ownership rules are extremely strict, for example allowing only 20% ownership of a newspaper or another broadcasting company. While some rules to prevent undue concentration of ownership are legitimate, these rules are unduly limiting and they should be reconsidered.

Section 24(b) gives existing broadcasters a nine-month window in which to bring their activities into line with the law. It does not make explicit, although this is perhaps implicit, that these broadcasters are presumed to have their licences continued under the new regime. This should be made explicit.

Unduly Intrusive Official Control Measures

A number of provisions in the draft Bill grant the Commission and the Minister permission to unduly interfere with the internal workings of a broadcast licensee. Emblematic of these is section 76, which requires all broadcasters to appoint an employee to serve as liaison with the Ministry and Commission. It is difficult to see what need this serves other than to facilitate control and we are unaware of any other country where this is required.

Section 50 requires all broadcasters to have an editorial board and to have their editorial policy and standards approved by the Commission. Similarly, pursuant to section 51, the Commission must approve the content rating rules of each broadcaster, and the same is true, pursuant to section 52, of a code of conduct governing staff and broadcasting content. It is legitimate for the Commission, through a code of conduct as described above, to set minimum global standards for broadcasting. It is not legitimate, however, for the Commission to micro-manage every broadcaster in the way prescribed by these rules. This is unnecessary and provides abundant opportunity for interference.

Another unduly intrusive provision is section 59(d), which requires any agreement on re-broadcasting to be subject to ministerial approval. There is no more warrant for government involvement in such agreements than in any other form of commercial activity.

Pursuant to sections 48 and 62, it would appear that the Minster can require broadcasters to carry certain broadcasts relating to national disasters or emergencies, and to set conditions for how this should be done. Once again, this is unduly intrusive. It is of course very important that this information reach the public but this can adequately be achieved by putting an obligation on the public broadcaster to cover these matters adequately. It is not necessary to dictate exactly what broadcasters should carry, over and above a general obligation on the public broadcaster to cover certain matters of national importance. Although rules of this nature do still exist in some democracies, they are applied very rarely if ever, and they have been rejected outright in other countries. Indeed, section 62(b) goes even further, requiring broadcasters to adhere to all directives issued by the Minister during a state of emergency. This is a draconian power which cannot be reconciled with the right to freedom of expression.

Section 73 requires broadcasters to have security procedures in place that conform to Commission standards. This is also an unduly intrusive measure that is not deemed necessary in democracies, even those facing significant and serious security risks.

Two of the most intrusive provisions are sections 78 and 79. The former allows courts, the military, the policy, the Commission and the Ministry to order a temporary halt to broadcasting. No conditions on this power are set out in the section. Section 79 similarly grants the Commission apparently unfettered power to invalidate broadcasting licenses. These are both extremely broad and unjustifiable powers which have no place in a broadcast regulatory policy of a modern democratic society.

Public Service Broadcasting

As noted, a key element in the draft Bill is the creation, by Part Seven, of a new National Broadcasting Corporation (NBC), to take over the Voice of Maldives and Television Maldives. NBC is clearly intended to be a public service, rather than a government or State, broadcaster. The Minister is to register the NBC as a public corporation operating under a memorandum and articles of association and the Commission is to ensure compliance with the rules. The freedom of expression of NBC is explicitly guaranteed and NBC is given a clear public service remit, including to provide unbiased and high quality news and current affairs programming.

To ensure that the objective of transforming NBC into a true public service broadcaster is achieved, a number of significant changes to Part Seven are required. The independence of NBC needs to be significantly enhanced. As with the Commission, independence should be explicitly guaranteed in law. The Minister should not have unfettered discretion in relation to the memorandum and articles of association (see section 33(e)). Instead, the main rules could be set out in the primary legislation, as is the case in most democracies. Presently, public funding is to come from a direct State budget allocation, which could provide a route for interference (see section 36(j)). It would be preferable if the budget were set openly, by the People's Majlis or by some other open forum.

Section 39 provides for the appointment of Board members by the President in an open manner, after giving an opportunity for public nominations. Members are required to have expertise in a relevant field and to respect freedom of expression, justice and the right to know. While this contains some of the guarantees of independence we recommended earlier in relation to the Commission, it clearly lacks many others. There is no involvement of the People's Majlis, no protection of tenure, no prohibitions on politically connected individuals being appointed and so on. It may also be noted that, at least in translation, the draft Bill refers to State media and being run by the government (see, for example, sections 23(c) and 25(1)(a)). It would be preferable to replace these with references to public service broadcasting.

Furthermore, a number of important matters are left out of the brief provisions on the NBC. Among other things, the rules fail to set any limits on advertising by NBC and do not provide for public accountability systems. No doubt these may be contained in the memorandum and articles of association but it would be preferable to have them in the primary legislation.

Miscellaneous

We have concerns about a number of other provisions in the draft Bill. Section 46 requires all broadcasters to carry one news bulletin – the one believed to be the most popular – from the State media. This is simply unnecessary and not the practice in other democracies. Indeed, some countries which used to have a rule of this nature, such as Indonesia, have dropped it, having recognised that it is inconsistent with the right to freedom of expression. One of the main objectives of broadcast regulation is to promote

diversity of sources of information and ideas to the public, rather than to repeat the same source of news on each station.

Section 53 sets a minimum floor of 15% local content for all broadcasters, or such higher percentage as may be prescribed by the Commission, and calls for local content to be steadily increased. ARTICLE 19 supports local content rules but these provisions are unduly vague and grant a wide degree of discretion to the Commission. It would be preferable to require the Commission to prepare a schedule of local content percentages and then apply this to different categories of broadcaster rather than allowing for a different rule to be prescribed for each broadcaster. The cost of production of local content can be quite expensive and such content requirements should be phased in, particularly if there are broadcasters who are in the initial set-up stages of programming.

Pursuant to sections 64 and 65, respectively, broadcasters must correct errors and apologise for broadcasts which breach any law or regulation, in both cases as soon as the mistake is realised or within one hour of broadcast. While this is a fair requirement, the time scale is impractical; broadcasters should be given at least 24 hours from realising the mistake to rectify it and/or apologise.

Section 68 sets out the schedule of fees payable by broadcasters, which, for an initial licence, is Rufiyaa 60,000 (approximately USD4,800) for the public broadcaster, Rufiyaa 48,000 (approximately USD3,840) for a private broadcaster and Rufiyaa 6,000 (approximately USD480) for a community broadcaster. The annual renewal fee is one-half of this. It is not clear what the purpose is of charging the public broadcaster, which is to be funded from the public purse, for its licence. In many countries, a schedule of fees is applicable to commercial broadcasters, depending on the type (radio or television), manner of broadcasting (satellite, cable, terrestrial) and geographic reach. In other countries, licences are awarded on a competitive basis to the highest bidder which meets minimum standards. Regardless, a flat rate for all commercial broadcasters is inappropriate. The fee for community broadcasters is high, especially for a poor country like the Maldives, and consideration should be given to reducing it.

Omissions

Broadcast regulation is a complex matter and there appear to be a number of issues that the draft Bill fails to address. Some of these are noted above while others are as follows:

- Setting basic rules of procedure for the Commission, such as rules relating to meetings.
- Putting in place a system for longer-term planning for the radio frequency spectrum, at least for the portion that is allocated to broadcasting.
- Setting limits on the types of conditions that may be imposed on broadcasters through their broadcasting licences.
- Setting the basic rules for responding to public complaints.