



MEMORANDUM

on

Malaysia's Press Council Bill 2006

London
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SUMMARY OF RECOMMENDATIONS

Recommendation 1: Sign and ratify the International Covenant of Civil and Political Rights as a matter of urgency

- With the exception of Singapore and Burma and Brunei, every other state in the Asian region has signed or ratified the ICCPR.

Recommendation 2: Amend Bill to strengthen the Council as an independent, self-regulatory body

- Remove the members of Parliament and Senators from the membership of the Council
- Remove all of the Minister's powers and functions in relation to the Council, including:
 - The Minister's power to determine the salary of the Chairperson and payments to Council Members
 - The Minister's designation as the appellate authority for the Licensing and Permits Board
 - The Council's obligations to provide the Minister with a budget, annual reports and, at its discretion, interim reports
- Replace Section 9(3) with a provision outlining the 'rules of incompatibility' governing the appointment of Council members.
- Establish the scaled industry-specific levy as the main source of funds for the Council.
- Funding of the Council via a governmental grant should not apply to the Council's core operational activities; it should only be a source of supplementary funds. Any governmental grant should not be perceived as conditional on the Council conducting its work in a manner which is not antagonistic to the government.

Recommendation 2: Review system of licensing and permits

- Abolish the system of licenses for licences for printing presses and permits for publishing a newspaper.
- Replace publishing permits with technical registration only.

Recommendation 3: Improve procedural fairness and appeals mechanism

- Procedural fairness requires the removal of members of Parliament and Senators from the Council
- Remove Minister as the appellate body for review of decisions of Licensing and Permits Board
- The Appeals Boards for the Licensing and Permits Board and the Press Complaints Board should consist of members, past or present, of the Malaysian judiciary, who have been appointed via a bi-partisan election conducted by the House of Representatives.

Recommendation 4: Increase consultation in formulating codes and guidances and review use of fines as sanctions

- Expressly require the Codes and Guidance Board to undertake wide scale consultation and participation within the print media sector in promulgating codes and guidance
- Consider making provision for consultation outside of the print media sector when promulgating codes and guidance
- Require any code or guidance issued by the Codes and Guidance Board to state which individuals or organisations were consulted or participated in the promulgation of the code or guidance
- Ensure all print media regulation is included in codes and guidances
- Remove the Press Complaints Board's power to impose a fine

1. INTRODUCTION

The purpose of this Memorandum is to provide further drafting assistance on the Press Council Bill 2006 ('Bill') for the establishment of a Press Council in Malaysia. ARTICLE 19 provided comments and recommendations in April 2003 for the earlier draft Press Council proposal.¹ We note that significant progress has been made to establish the Press Council as an independent self-regulatory body, to promote press freedom and professional and ethical journalism. The Bill is stated to be part of Malaysia's commitment as a progressive democratic nation to the protection of fundamental civil liberties as enshrined in Article 10(1) of the Constitution of Malaysia (Paragraph 12, Explanatory Notes).

Our comments primarily relate to strengthening the Press Council's independence and structure to ensure the objectives of the Bill are realised. We refer to the Bill and the accompanying Explanatory Notes in the context of the international standards governing the right of freedom of expression, which encompasses freedom of the press. We also refer at times to ARTICLE 19's standard-setting publications for media regulation in the context of freedom of expression. These publications draw together best practice under international law, as formulated from statements from authoritative international bodies and jurisprudence from both international and national courts.

We further make reference to other examples of press councils in the Asian region as indicators of how a system of self-regulation has been implemented. A summary of the press freedom ranking of countries in the region is included in Annexure A as context for the Malaysian proposal. There is a strong correlation between the recognised degree of press freedom in each country and the existence of an independent self-regulatory press council. These examples demonstrate that in order to achieve the stated aim of promoting press freedom and promoting professional and ethical journalism, self-regulation is essential.

Section 2 of this Memorandum outlines the international standards for the right of freedom of expression, including the international guarantees, the role of the media in the realisation of the right of freedom of expression and when restrictions on freedom of expression are legitimate under international law. Section 3 of this Memorandum outlines the protection of the right of freedom of expression in the Constitution of Malaysia. Section 4 outlines our analysis of the Bill and our recommendations for ensuring that the Press Council promotes press freedom and ethical and responsible journalism through self-regulation.

¹ ARTICLE 19, *Memorandum on the Malaysian Draft Media Council Act 2002 and the Media Council (Procedure for Inquiry) Regulations*, April 2003 (London). Available at: <http://www.article19.org/pdfs/analysis/malaysia-med.03.pdf>.

2. INTERNATIONAL STANDARDS

2.1. International Guarantees of Freedom of Expression

2.1.1. International Conventions

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

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

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.³ It has also been cited in ASEAN documents agreed by Malaysia⁴ and Malaysia took part in the 1993 Vienna World Conference on Human Rights that reaffirmed its full commitment to the UDHR.⁵

The *International Covenant on Civil and Political Rights* (ICCPR),⁶ 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 relevance here.

We strongly urge Malaysia to sign and ratify the ICCPR. Amongst other compelling reasons, ratification would give meaningful effect to Malaysia's declaration in Paragraph 12 of the Explanatory Notes that it is "progressive democratic nation to the protection of fundamental civil liberties". Malaysia truly stands alone as a progressive nation in the Asian region in failing to ratify this cornerstone treaty of human rights. With the exception of only Singapore, Burma and Brunei, every nation in the Asian region has either signed or ratified the ICCPR.⁷ The majority of nations have fully ratified the ICCPR; the only nations which have only signed are China, Laos and Nauru.

2.1.2. Commonwealth Declarations

As a Member of the Commonwealth, Malaysia has also affirmed its commitment to the protection of human rights generally and the right to freedom of expression specifically

² UN General Assembly Resolution 217A(III), adopted 10 December 1948.

³ See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.

⁴ See, for example, the Ha Noi Plan of Action, adopted at the 6th ASEAN Summit 15-16 December 1998, Hanoi, Vietnam. Malaysia is a founding Member Country of ASEAN (Association of Southeast Asian Nations).

⁵ Report of the World Conference on Human Rights, UN Doc. No. A/CONF.157/24 (Part I), 13 October 1993.

⁶ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁷ Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/4.htm>.

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through statements issued by the Commonwealth Heads of Government Meetings.⁸ In the 2001 Coolum Declaration, the Commonwealth Heads of Government declared that they:

... stand united in our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights.⁹

Similarly, in the 2003 Abuja Communiqué, the Commonwealth Heads of Government declared:

Fundamental Political Values

7. Heads of Government reaffirmed their commitment to the fundamental political values of the Commonwealth as set out in the Singapore and Harare Declarations and subsequent CHOGM Communiqués, and reinforced by the Millbrook Action Programme. They reiterated their commitment to non-racism, international peace and security, democracy, good governance, human rights, rule of law, the independence of the judiciary, freedom of expression, and a political culture that promotes transparency, accountability and economic development.¹⁰

In the 2003 Aso Rock Commonwealth Declaration, they also declared:

We recognize that building democracy is a constantly evolving process Among the objectives we seek to promote are the following:

....

vi. the right to information.¹¹

2.1.3. Other regional undertakings on freedom of expression

The right to freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights* (ECHR),¹² Article 13 of the *American Convention on Human Rights*¹³ and Article 9 of the *African Charter on Human and Peoples' Rights*.¹⁴ While neither these treaties nor the judgments of courts and tribunals established under them are formally binding on Malaysia, they provide good evidence of the appropriate interpretation of the right to freedom of expression as guaranteed by the UDHR as well as by the Malaysian Constitution.

2.2. The Media and Freedom of Expression

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."¹⁵

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:

⁸ See the Harare Commonwealth Declaration, Zimbabwe, 1991; Declaration of Commonwealth Principles, Singapore, 1971. On freedom of expression specifically, see the Abuja Communiqué, 8 December 2003 and the Coolum Declaration on the Commonwealth in the 21st Century: Continuity and Renewal, Australia, 2002.

⁹ Note 8.

¹⁰ Note 8.

¹¹ http://www.humanrightsinitiative.org/cwhr/decdoc/aso_rock_declaration_on_dd.pdf, para. 7.

¹² Adopted 4 November 1950, in force 3 September 1953.

¹³ Adopted 22 November 1969, in force 18 July 1978.

¹⁴ Adopted 26 June 1981, in force 21 October 1986.

¹⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34.

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[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'.¹⁶

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 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.¹⁷

This has been recognised by the constitutional courts of individual States around the world. For example, the Supreme Court of South Africa has held:

The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.¹⁸

In order to ensure that the media is able to fulfil its critical role in achieving the right of freedom of expression, it is absolutely fundamental that any regulatory body which exercises power over the media is protected from political and commercial influence.

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.¹⁹

In December 2000, the Committee of Ministers of the Council of Europe issued a detailed Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector.²⁰ This provides that States should “guarantee the regulatory authorities for the broadcasting sector genuine independence”. Furthermore, “the procedures for appointment of their members and the means of their funding should be clearly defined in law.”²¹ Stipulating that its membership should be free from any political influence and that rules for dismissal should be clearly laid down by law, it recommends that “dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must

¹⁶ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹⁷ *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).

¹⁸ *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6.

¹⁹ *Athukorale and others v. Attorney-General*, 5 May 1997, 2 BHRC 609.

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

²¹ *Ibid.*, Guideline 2

comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal.”²² These rules apply to regulatory bodies for the print media *mutatis mutandis*.

2.3. Freedom of Expression and Self-Regulation of the Print Media

As the Bill recognises, self-regulation of the print media is a highly effective means of promoting freedom of the press as well as professional and ethical standards. In order to protect and promote freedom of expression, the least restrictive means of regulation should be imposed on the media necessary to protect legitimate interests (see Section 2.4 below). Statutory bodies are always at risk of political interference and abuse; in our experience, they can function satisfactorily only in well-established democracies with a strong tradition of the rule of law. For example, the *Declaration of Principles on Freedom of Expression in Africa* recognises this and states:

Effective self-regulation is the best system for promoting high standards in the media.²³

Self-regulation of the print media has been successfully adopted in countries around the world, and is advocated as an appropriate means of press regulation by the three Special Mandates on freedom of expression.²⁴

In order to establish an effective self-regulatory regime for the print media, wide scale consultation and participation within the print media sector is fundamental. There needs to be a strong process of consensus-building and acceptance of any code of conduct formulated, and the press council’s role as a representative and industry-accountable body, which has the mandate to enforce the code of conduct and respond appropriately.²⁵

2.4. Restrictions on Freedom of Expression

The right to freedom of expression is not an absolute right; it may, in certain narrow circumstances, be restricted. However, because of its fundamental status, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim; the right to freedom of expression may not be restricted just because a certain statement or form of speech is considered offensive or because it challenges established doctrines.

Article 19(3) of the ICCPR lays down the narrow parameters within which freedom of expression may legitimately be restricted. It states:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

²² *Ibid.*, Guideline 7.

²³ Principle IX.

²⁴ 1999 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. Accessible at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=141&IID=1>.

²⁵ ARTICLE A19, *Freedom and Accountability: Safeguarding Free Expression Through Media Self-Regulation*, March 2005 (London), p 75.

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(b) For the protection of national security or of public order (ordre public), or of public health or morals.

This has been interpreted as establishing a three-part test, requiring that any restrictions (1) be prescribed by law, (2) pursue a legitimate aim and (3) be necessary in a democratic society.²⁶

The European Court of Human Rights, ruling on the very similar clause stated in Article 10(2) ECHR, has stated that 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.”²⁷ This means that vague or broadly worded restrictions, or restrictions that leave excessive discretion to executive authorities, are incompatible with the right to freedom of expression.

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. Third, the interference must be “necessary” to secure one of those aims. The word “necessary” has specific meaning in this context. It means that there must be a “pressing social need” for the interference;²⁸ that the reasons given by the State to justify the interference must be “relevant and sufficient” and that the State must demonstrate that the interference is proportionate to the aim pursued. As the UN Human Rights Committee has stated, “the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.”²⁹

3. THE MALAYSIAN CONSTITUTION AND FREEDOM OF EXPRESSION

Article 10(1) of the Malaysian Federal Constitution guarantees freedom of speech and expression to every citizen.

Subject to Clauses (2), (3) and (4) -

(a) every citizen has the right to freedom of speech and expression;

Articles 10(2) and (4) of the Malaysian Constitution provide for restrictions on freedom of expression as follows:

(2) Parliament may by law impose -

(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 law 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

²⁶ See, for example, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005, para. 6.8.

²⁷ *Ibid.*, at para. 49.

²⁸ See, for example, *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40.

²⁹ *Rafael Marques de Morais v. Angola*, note 26, para. 6.8.

than in relation to the implementation thereof as may be specified in such law.

It may be noted that these protections are weaker than those found in international law. Crucially, the test for restrictions is not whether or not the restriction is necessary but the much lower standard of whether or not Parliament ‘deems’ the restrictions necessary or even ‘expedient’. The latter standard is much lower than that of necessity, and there is no objective requirement that the restriction actually is necessary or expedient. Additionally, the Malaysian Constitution includes grounds for restrictions that are not found under international law, namely the protection of friendly relations with other countries and the protection of the privileges of Parliament or of any Legislative Assembly.

4. ANALYSIS OF THE DRAFT

4.1. Scope of the Bill

The Preamble explains that the Bill is intended to establish a Press Council (‘Council’) for the purpose of preserving, promoting and protecting freedom of the press; and maintaining and improving professional and ethical standards in journalism. Section 5 states that the Council shall consist of a Chairman and 29 members, drawn from representatives of the press, members of Parliament, Senators, experts in human rights, science, literature and culture, a representative from the Malaysian Bar Council, and 3 members appointed by the Minister. It is not indicated in the Bill or the Explanatory Notes which Minister is being referred to throughout the Bill.

The Council will have a dual function – to promote press freedom and to regulate the activities of the press. One of the main activities of the Council is to draw up, in consultation with the press, a professional code of ethics, conduct and guidance (section 17). The Codes and Guidance Board, and the Press Complaints Board, will regulate the observance of this, or these, code(s). The Press Complaints Board will have the power to order the publishing of corrections, the Council’s opinion, and to impose fines as it thinks fit (section 15(5)). The other board of the Council, the Licensing and Permits Board, will have responsibility transferred to it from the Minister for the issuing of printing press licences and permits to publish newspapers (section 11).

The Minister has a substantial role in the operations of the Council. In addition to appointing 3 Council members, the Minister determines and pays the salary of the Chairman and any monies paid to the Council members (section 9(1)). Any appeal from the Licensing and Permits Board is made to the Minister (section 13(2)); and the Council is required to present an annual budget and annual report to the Minister (sections 28, 29). The Minister is responsible for tabling the Council annual report in both Houses of Parliament (section 29). Interim reports may also be made by the Council, which must be provided to the Minister (section 30).

4.2. A Press Council - an Independent, Self Regulatory Body

Paragraph 13 of the Explanatory Notes to the Bill states that the Council is to be an “independent self regulatory body”, which is “impartial and accountable”. Section 4(b) of the Bill states that the Council must discharge “its obligation as a watchdog of public interests”. Part V of the Bill also establishes a Codes and Guidance Board to develop a professional code of ethics and conduct and guidance. Breaches of the code will be referred to the Press Complaints Board

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Despite these provisions, there are a number of aspects of the Council's structure which undermine its status as a self-regulatory body, and as an independent body, a fundamental platform of the Bill. As noted above in Section 2.3 having a self-regulatory body for the press greatly enhances not only freedom of the press but also strongly promotes professional and ethical standards. This practice has been adopted in many countries around the world, with great success. As referred to above in the Introduction, a number of countries in the Asian region have successfully implemented a press council to regulate the print media, including Indonesia,³⁰ Thailand,³¹ the Philippines,³² India³³ and Hong Kong.³⁴

In order for the Council to be able to function as an independent body, it must be protected from commercial and political interference, as discussed above at Section 2.2. Having members of Parliament presents a serious problem in this regard, as does the Minister's oversight role over the activities of the Council more generally.

4.2.1. Composition of the Council

Section 5 of the Bill provides that the Council shall consist of a Chairman and 29 members, who will include 10 representatives from the press; 5 members of Parliament nominated by the Speaker of the House of Representatives; 3 Senators nominated by the President of the Senate; 8 experts in human rights, education, science, literature and culture; a representative from the Malaysian Bar Council; and 3 members appointed by the Minister.

We are most concerned by the introduction of politicians to the Council - section 5 is a significant change from the previous version of the proposed Council. It is not possible to describe the Council as an "independent self-regulatory body", as stated in Paragraph 13 of the Bill's Explanatory Notes, if there are members of Parliament and persons appointed by the Minister forming part of the Council. Nor will the Council be able to perform its function as a "watchdog of public interests" as stated in section 4(b) of the Bill. Furthermore, the nomination of members of Parliament and Senators is particularly problematic as representatives from the ruling political party may be in a position to dominate the nomination process, which seriously undermines the independence of the Council. We consider that the presence of politicians on the Council is a provision which must be removed from the Bill.

Self-regulation is the stated purpose of the Bill and, as discussed above in Section 2.3, it is widely regarded as the most effective way to promote press freedom and ethical and professional journalism. Self regulation through a Council which does not have politicians or ministerial appointees has been adopted in Indonesia, Thailand, the Philippines and Hong Kong. In the Asia Pacific region, Fiji's Council – which is composed media companies and

³⁰ ARTICLE 19, *Indonesia Baseline Study: Freedom of Expression and the Media*, December 2005 (London), p 40. Accessible at: <http://www.article19.org/pdfs/publications/indonesia-baseline-study.pdf>. See also www.presscouncils.org.

³¹ Charter of the Press Council of Thailand, <http://www.presscouncil.or.th/th2/content/view/3/18/>. See also ARTICLE 19, *Thailand Baseline Study: Freedom of Expression and the Media*, December 2005 (London). Accessible at: <http://www.article19.org/pdfs/publications/thailand-baseline-study.pdf>. See also www.presscouncils.org.

³² A Panorama of Press Councils, AIPC (2003), http://www.media-accountability.org/library/Panorama_World_PC_2003.doc, See also ARTICLE 19, *Philippines Baseline Study: Freedom of Expression and the Media*, December 2005 (London). Accessible at: <http://www.article19.org/pdfs/publications/philippines-baseline-study.pdf>.

³³ See <http://www.presscouncils.org/>.

³⁴ A Panorama of Press Councils, Note 32.

private individuals - is a regional benchmark which Tonga has followed and Samoa is seeking to do the same.³⁵

4.2.2. Rules of incompatibility for members of Council

Section 9(3) states that being a member of either House of Parliament shall not disqualify a person from serving as a member of the Council.

In line with our comments above at Section 4.2.1, it is completely at odds with the Council's status as an independent self-regulatory body to have members of either House of Parliament sitting as members of the Council. In our previous advice on the proposed Council, we outlined that establishing 'rules of incompatibility' is fundamental to establishing an independent regulatory body.³⁶ Such a provision should include the following:³⁷

No one shall be appointed to the Press Council if he or she: -

- (a) is employed in the civil service or any other branch of government;
- (b) holds an official office in, or is an employee of, a political party;
- (c) holds an elected position at any level of government; or
- (d) has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime and/or a crime of dishonesty or theft, for which he or she has not been pardoned, unless five years have passed since the sentence was discharged;

We recommend that section 9(3) should be removed and replaced with a provision in line with the above drafting.

4.2.3. Funding of Council

The Bill proposes three sources of funding for the Council – the Chairman's salary shall be paid according to the Minister's discretion and the other members shall be paid allowances or fees for attending council meetings (Section 9(1)); the Government of Malaysia may grant funds to the Council at its discretion (Section 26); and the Council may also levy fees payable by media outlets to fund its activities (Section 25).

The funding of the Council is a key issue for its establishment as an independent body. To ensure the independence of the Council, we recommend strengthening the reliance on the use of a levy on the print media sector, as referred to in section 25. This provision should be further elaborated in order to maximise its potential as a workable source of funds. Relying on an industry levy is an effective means of ensuring that the Council remains accountable to the industry and utilises its funds efficiently. The levy payable should correspond to the financial capability of the media outlet, as is referred to in section 25. This should be more clearly outlined in the Bill. For example, in India, the levy is only payable by those newspapers which have a daily circulation of over 5,000 copies.³⁸ We suggest that a scaled fee structure for all print media outlets would be an appropriate method. In addition to scaling the levy according to the circulation of the publication, we suggest also creating categories for which a reduced levy, or a waiver, applies, such as publications of non government organisations or academic publications.

³⁵ Press Councils and M*A*S in the Pacific, AIPC (11th October 2005). <http://www.media-accountability.org/html/frameset.php?page=news>.

³⁶ Note 1, p 12.

³⁷ This drafting has been extracted from s 6(2) of ARTICLE 19's *Model Public Service Broadcasting Law*, available at <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>.

³⁸ *Press Council Act*, 1978.

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There is substantial potential for the levy to cover the vast bulk of the operating costs of the Council. This would remove most of the need to rely on government funding. This is absolutely crucial for the Council's independent status. We consider the direct funding of the Chairperson and the members of Council by the Minister to be completely untenable with the objective of the Bill in establishing an independent self-regulatory body. It is far more preferable that these sums are paid out of the levy.

In terms of a governmental grant to the Council, we consider this is a reasonable measure, insofar as the Council is not dependent on these monies for its core operational activities, and the grant is not perceived to be conditional on the Council conducting its work in a manner which is not antagonistic to the government. Again, the levy should be the primary source of funds, with any governmental grants only providing supplementary funds, on which the Council is not dependent in any substantive manner.

4.2.4. Council's reporting requirements

Section 29 requires the Council to prepare an annual budget and provide this to the Minister. Section 31 states that the Councils' account shall be maintained and audited in such a manner as may be prescribed by the Comptroller and Auditor-General of Malaysia. Section 29 requires the Council to prepare an annual report, summarising its activities and giving an account of ethical and professional standards of newspapers, and to provide this report to the Minister for tabling in both Houses of Parliament. Section 30 states that the Council may issue interim reports on its activities which it considers to be of public importance. Such interim reports shall be provided to the Minister and the Minister shall table them in both Houses of Parliament.

This type of financial and activity reporting is appropriate for a government agency or statutory body. It is not appropriate, however, for an independent self-regulatory body (even one which is established, albeit, by statute). In line with our recommendation that the Council should be primarily funded by an industry levy, there would be no reasonable justification for reporting requirements to the Houses of Parliament. The use of the industry levy would appropriately make the Council accountable to the print media sector and its annual report – which should include relevant financial information – could be published on its website and publicised to the print media. Furthermore, in any event, it is wholly inappropriate that the Minister oversees all of these processes. This creates significant scope for political interference in the work of the Council.

Recommendations:

- Remove the members of Parliament and Senators from the membership of the Council
- Remove all of the Minister's powers and functions in relation to the Council, including:
 - The Minister's power to determine the salary of the Chairperson and payments to Council Members
 - The Minister's designation as the appellate authority for the Licensing and Permits Board
 - The Council's obligations to provide the Minister with a budget, annual reports and, at its discretion, interim reports
- Replace Section 9(3) with a provision outlining the 'rules of incompatibility' governing the appointment of Council members.

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- Establish the scaled industry-specific levy as the main source of funds for the Council.
- Funding of the Council via a governmental grant should not apply to the Council's core operational activities, it should only be a source of supplementary funds. Any governmental grant should not be perceived as conditional on the Council conducting its work in a manner which is not antagonistic to the government.

4.3. Licensing and Permits

In conjunction with the *Printing Presses and Publications Act* 1984, section 21(1) of the Bill states that the Licensing and Permits Board of the Council may in its absolute discretion grant a permit to publish a newspaper. The licence may be revoked or suspended at any time and can only be given for a limited time period (usually one year).

Section 20(2) provides that the Licensing and Permits Board of the Council may, at its discretion, issue a licence to use a printing press for a period specified in the licence (usually one year). Section 20(2) also provides that the Licensing and Permits Board may, in its discretion, refuse any application, or revoke or suspend any licence for such period as it considers considerable.³⁹

We consider that both the issuing of licences to use a printing press and a permit to publish a newspaper to be unjustifiable restrictions on the right of freedom of expression. We urge that these requirements are abolished. They are neither nor appropriate in a self-regulatory regime for the print media. In respect of printing press licences, we emphasise that the protection of freedom of expression extends to the *means* of communication, not just the actual expression. Most ASEAN countries whose press freedom is rated as at least "Partly Free" do not impose such a requirement, such as Indonesia and Thailand.⁴⁰

In respect of requiring a permit to print a newspaper, it is important to make a distinction between technical registration of newspapers and a permit issued at the discretion of a regulatory body. The latter, which is currently in place in Malaysia, is seriously problematic in terms of the protection of freedom of expression. It is well established under international law that such licensing requirements for the print media are a serious fetter on the free flow of information and are not permissible restrictions. They do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justified licensing. Again, in most ASEAN countries with a press freedom rating of at least "Partly Free", a permit for the publishing of a newspaper is not required. These countries include Indonesia, Thailand and the Philippines.

Recommendations:

- Abolish the system of licenses for licences for printing presses and permits for publishing a newspaper.
- Replace publishing permits with technical registration only.

³⁹ We note the use of the term "considerable" in section 20(2) may be a drafting or translation error. We have proceeded on the basis that the correct term is "reasonable".

⁴⁰ See Appendix A.

4.4. Procedural Fairness and Appeals

4.4.1. Procedural Fairness

The Licensing and Permits Board is appointed the decision maker for all licence and permit applications, in place of the Minister (section 11 and 21). Both the Licensing and Permits Board and the Press Complaints Board state that their operations are subject to the principles of natural justice (sections 12(3), 15(7)), and that the Board must give reasons for its decision (sections 12(2), 15(6)). Part VI of the Bill sets out a number of amendments to the *Printing Presses and Publications Act 1984* to implement these principles of natural justice.

The Explanatory Notes emphasize that the process for the consideration of licence and permits applications is to be “transparent and fair” and the decision maker is the Licensing and Permits Board rather than the Minister (Paragraph 14). Decisions of the Licensing and Permits Board are stated to be subject to the principle of natural justice, such that any decision of the Board must be reviewable (Paragraph 14). Similarly, the Press Complaints Board seeks to implement principles and procedures to ensure that complaints are dealt with fairly and impartially (Paragraph 15, Explanatory Notes).

Subject to our significant concerns regarding the requirement of licences and permits outlined above at Section 4.3 , we note that the Bill places a great deal of emphasis on procedural fairness in the operations of the Boards of the Council and we consider these to be very welcome amendments to the Bill, which will further the independent self-regulatory nature of the Council. Having an independent decision maker is absolutely critical in the exercise of regulatory power over the media, in order to protect and promote press freedom. Also, in the enforcement of the code of conduct, it is imperative that the Council follows due process to ensure public confidence in the code as a means of regulation.

The presence of members of Parliament and Minister appointees on the Council, however, is problematic for the achievement of procedural fairness, as discussed in Section 4.2 above. The principles of natural justice require that the decision maker is impartial and independent. If not this not the case, the decision making body is considered to be improperly constituted and its decisions voidable.

4.4.2. Appeals

According to the Bill, a party aggrieved by a decision of the Licensing and Permits Board may appeal the decision to the Minister, subject to section 3A and/or section 6A of the *Printing Press and Publications Act 1984* (section 13(1)). The amended version of sections 3A and 6A of the *Printing Press and Publications Act 1984* are set out in sections 20(3) and 21(4) of the Bill. These provide that a person aggrieved by a decision of the Licensing and Permits Board has a right of appeal to the Minister and that any appeal must be lodged within 90 days. An appeal application to the Minister shall be presented before a newly appointed Board (section 13(2)); and the Minister’s decision will be final (section 13(3)).

In respect of the Press Complaints Board, a right of appeal lies against a decision of the Board (section 16(1)). Such appeal applications shall be presented before a newly appointed Board – the Appeal Board (section 16(2)). Appeals will only be dealt with by way of case stated (section 16(3)) and the decision of the Appeal Board is final (section 16(4)).

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We consider that the positive measures in respect of procedural fairness are severely undermined by the weaknesses of the appeals mechanism. The Bill fails to provide a meaningful avenue of appeal for the following reasons:

- The appeal is not separate from the Minister in respect of the Licensing and Permits Board; and
- There is insufficient specification for appeals from the Press Complaints Board to protect it from political influence.

In respect of the Licensing and Permits Board, one of the main stated aims of the Bill is to transfer responsibility to the Council from the Minister for determining licence and permit applications. This transfer of responsibility is undermined by granting the Minister responsibility for the hearing of appeals. We note that section 13(2) attempts to establish an Appeals Board, but section 13(2) implies that the Minister will be responsible for the appointing of the Appeals Board and section 13(3) indicates that the Minister will have the final say in any appeal. We consider that there is no justification for the continued involvement of the Minister in the licensing and permits process. An effective right of appeal requires the review body to be independent of both the Licensing and Permits Board, as well as from political influence. We strongly recommend that the Bill is amended to remove the Minister's involvement and provide further specification for the appointment of the Appeal Board, free from political interference.

We recommend that representatives, past or present, of the Malaysian judiciary should compose the Appeals Board, and these members should not be appointed by the Minister. These members should be appointed via a bi-partisan election process through the House of Representatives.

In respect of the enforcement of the code of conduct, the Bill recognises that this is an essential component in self-regulation of the press, which the Bill is seeking to establish. The right of appeal from a determination from the Press Complaints Board does not refer to the Minister. To ensure that this independent review is maintained, section 16 should be amended to ensure that the Minister has no influence over the appointment of the Appeal Board, or in its review of the determination of the Press Complaints Board.

Recommendations:

- Procedural fairness requires the removal of members of Parliament and Senators from the Council
- Remove Minister as the appellate body for review of decisions of Licensing and Permits Board
- The Appeals Boards for the Licensing and Permits Board and the Press Complaints Board should consist of members, past or present, of the Malaysian judiciary, who have been appointed via a bi-partisan election conducted by the House of Representatives.

4.5. Code of Conduct

4.5.1. Drafting of a code of conduct

Section 17 of the Bill provides that the Codes and Guidance Board is to develop a professional code of ethics and conduct and guidance. Section 18(1) states that the Codes and

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Guidance Board may issues codes and guidance to journalists, publishing agencies, news agencies, the Press Complaints Board and the Licensing and Permits Board. Section 19 states that before issuing any code or guidance, the Codes and Guidance Board shall consult with any such person, persons or organisations that the Codes and Guidance Board thinks fit.

We note that a code of conduct forms the lynch pin of self regulation of the media and we commend the emphasis placed on such codes in the Bill for the operating platform of the Council. The current proposal, however, needs to be more detailed and include a much higher specification of consultation and participation if the proposed self-regulation system is going to succeed. Self regulation requires a high degree of consensus-building, ownership and adoption within the regulated sector. Widespread consultation, participation and transparency are the most effective way to achieve this.⁴¹

This necessitates amendment of section 19 of the Bill. The Codes and Guidance Board should be expressly *required* to undertake wide scale consultation of all interested parties within the print media sector as part of the promulgation of any code of conduct. In addition, any interested stakeholders outside of the print media sector should also be included in a consultation process, as far as is feasible. Furthermore, participation beyond consultation should also be encouraged for interested parties within the print media sector, such as the drafting of the terms of the code. Finally, any code or guidance issued by the Codes and Guidance Board should list at the outset which representatives of the print media sector were involved in public consultation and any further participation in the drafting of the code.

4.5.2. Content of codes and guidance

The codes and guidance issued by the Codes and Guidance Board should form the comprehensive rules which are specific to the print media sector. We note that, presently, there are provisions in the *Printing Presses and Publications Act 1984* regulating the print media which are not referred to in the Bill. For example, section 8A(2) imposes a prohibition on the publication of ‘false news’. While we express serious concern over this provision, which poses a serious threat to the protection of freedom of expression, and do not condone its continued existence, we make the more general note that such media-specific directives should be regulated by the Council, in line with any codes or guidances issued by the Codes and Guidance Board. It is critical that the Council has a comprehensive remit over any issues affecting the regulation of the print media. We recommend that an express provision is inserted into Part V of the Bill to reflect this.

4.5.3. Enforcement and Sanctions

Section 14 provides that the object of the Press Complaints Board is to adjudicate and resolve complaints against and by the press for breach of any codes or guidances. Section 15(5) provides that the Press Complaints Board may issue any of the following sanctions: publication of the Press Complaints Board’s criticisms or findings in full and with due prominence by the editor of the print media outlet; publications of a public apology by the print media outlet; and/or impose a fine as the Press Complaints Board sees fit.

We consider that the first two penalties which the Press Complaints Board may impose under section 15(5) are wholly in line with the objectives and force of self-regulation of the print media. The imposition of a fine, however, we consider to be problematic. Financial sanctions have the potential to be highly oppressive to a developing print media sector and unnecessary in achieving the objectives of self-regulation. We note that in countries in the Asian region

⁴¹ Note 25.

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where an independent self-regulatory Council has been established, fines are not commonly (or never) used. For example, in the Philippines, the Council has the authority to require a paper to public a correction or the Council's opinion; in Indonesia, the Council issues recommendations; in Thailand, the Council acts on receipt of a complaint to order the publication of a correction; in Sri Lanka, disputes are settled by the Council by conciliation, mediation or arbitration; in India, the Council can require a newspaper to publish a right of reply or the Council's opinion; in Taiwan, the Council issues recommendations; and in Hong Kong, the Council has the power to order corrections.

Recommendations:

- Expressly require the Codes and Guidance Board to undertake wide scale consultation and participation within the print media sector in promulgating codes and guidance
- Consider making provision for consultation outside of the print media sector when promulgating codes and guidance
- Require any code or guidance issued by the Codes and Guidance Board to state which individuals or organisations were consulted or participated in the promulgation of the code or guidance
- Ensure all print media regulation is included in codes and guidances
- Remove the Press Complaints Board's power to impose a fine

APPENDIX A

Each year since 1980, Freedom House has published an authoritative study on the level of press freedom in countries around the world. The 2005 Report is available at: <http://www.freedomhouse.org/template.cfm?page=56&year=2005>

Freedom House explains its methodology as follows:

Our examination of the level of press freedom in each country currently comprises 23 methodology questions divided into three broad categories: the legal environment, the political environment, and the economic environment. For each methodology question, a lower number of points is allotted for a more free situation, while a higher number of points is allotted for a less free environment. The diverse nature of the questions seeks to encompass the varied ways in which pressure can be placed upon the flow of information and the ability of print, broadcast, and Internet-based media to operate freely; in short, we seek to provide a picture of the entire "enabling environment" in which the media in each country operate. Each country is rated in these three categories, with the higher numbers indicating less freedom. A country's final score is based on the total of the three categories: a score of 0 to 30 places the country in the Free press group; 31 to 60 in the Partly Free press group; and 61 to 100 in the Not Free press group.⁴²

The results from the 2005 Report rank these selected countries as following:

Country	Press Freedom rating	Press Council Details
Fiji	Free	Fiji Media Council <ul style="list-style-type: none"> • Voluntary organisation since the 1990s • Composed of Chairperson, representatives of the press and the public • Can impose measures appropriate for the furtherance of its Constitution
Hong Kong	Free	Hong Kong Press Council <ul style="list-style-type: none"> • Statutory organisation since 2000 • Representatives of the press and the public • Can impose order to publish correction
Taiwan	Free	National Press Council of the Republic of China <ul style="list-style-type: none"> • Voluntary organisation • Representatives of the press, academics, legal experts, civic leaders • Power to investigate complaints of violations of code of conduct
India	Partly Free	Press Council of India <ul style="list-style-type: none"> • Independent body created by statute • Journalists, managers and editors nominated by recognized

⁴² <http://www.freedomhouse.org/template.cfm?page=56&year=2005>.

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		<p>press organizations, 5 are nominated from parliament, and 3 represent experts in the cultural, literary, and legal fields</p> <ul style="list-style-type: none"> • Can enforce a right of reply and order a newspaper to public the Council's decision
Indonesia	Partly Free	<p>Indonesian Press Council</p> <ul style="list-style-type: none"> • Independent self-regulatory body established by Press Law • Journalists, managers, public figures and media experts • Power to hear and investigate complaints of violations of code of conduct
Philippines	Partly Free	<p>Philippine Press Council</p> <ul style="list-style-type: none"> • Voluntary organisation since 1993 • Representatives of national newspapers on the Board of the Philippine Press Institute, and as of 2001, includes representatives from academia, business, and law. • Power to order newspaper to public a correction or the Council's determination.
Thailand	Partly Free	<p>Press Council of Thailand</p> <ul style="list-style-type: none"> • Voluntary organisation • Representatives of media management, editors, journalists and experts • Has power to act on receipt of a complaint and investigate
Sri Lanka	Partly Free	<p>Press Complaints Commission of Sri Lanka</p> <ul style="list-style-type: none"> • Voluntary organisation since 2003 • Power to hear complaints, which are settled by conciliation, mediation, or arbitration
Cambodia	Not Free	None
Laos	Not Free	None
Singapore	Not Free	None
Viet Nam	Not Free	None