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Promoting human rights and democracy through the media since 1993

Submission to the Press Freedom Commission

Regulation of Print Media in South Africa

15 December 2011

1. Executive Summary

- 1.1 This document is submitted by Media Monitoring Africa to the Press Freedom Commission (PFC) (15 December 2011) following a call for submissions from the Press Freedom Commission on the Regulation of Print Media in South Africa.
- 1.2 MMA supports more independent self regulation. By definition self regulation refers to a peer review system operating within a set of self- imposed rules by the media. It consists of representatives from the media profession passing judgement of complicated matters of journalistic reporting using a Journalistic Code of Ethics which is applied in determining the final ruling , and benchmarking the generally accepted norms and standards.¹
- 1.3 MMA is of the view that although the current system of self-regulation is in principle appropriate, it can be improved and strengthened in a variety of respects. Apart from taking measures to ensure that the general public and the media is educated and well-informed about the Press Council and its role, these improvements would require the adoption of amendments to the Press Council's Constitution, the Press Code and the Complaints Procedures.

The structure of this submission

In responding to the call for submissions on Print Media Regulation, MMA bases its submission on the previous submission made to the Press Council. MMA believes that the strengthening of the Press Council will not only improve the self regulatory mechanism of South Africa but will also enhance our democracy and encourage freedom of expression and the free flow of information. In section 2 of the submission MMA outlines a little about MMA itself. Section 3 presents the core value and assumptions that underlie and support the submission. In section 4 of this submission we outline the four potential models as well as the principles against which they may be judged. In section 5 we briefly discuss the shortcomings of the current self-regulatory system. Section 6 sets out in brief a number of recommendations that we believe will address those shortcomings in a manner that will contribute to the continued survival and

¹ Definition by the Press Freedom Commission found at <http://www.pressfreedomcomm.org/>

success of the self-regulatory system and ensure that it properly serves the public interest as discussed above.

2. About Media Monitoring Africa

2.1 MMA is grateful for the opportunity to make this submission and would further welcome the opportunity to orally present the issues raised.

2.2 Media Monitoring Africa (“MMA”, formerly the Media Monitoring Project) is a human-rights based NGO that has been promoting human rights and democracy through the media since 1993. Initially, MMA was formed with the purpose of monitoring the public broadcaster’s coverage of the first democratic elections.

2.3 MMA’s vision is for a responsible, quality media that enables an engaged and informed citizenry in Africa and across the world. It seeks to realise the following core objectives:

2.3.1 To be a leading media “watchdog” in Africa;

2.3.2 Improved news quality and ethics in reporting in Africa; and

2.3.3 Robust and effective communication legislation and media codes of conduct in Africa.

2.4 During its 17-year existence, MMA has conducted over 130 media monitoring projects, on a diverse range of media issues, including race (SAHRC, CSVR); Elections; Gender (GMBS, GMMP); Children (ECM); HIV (WITS, MAP). In addition, MMA has been involved in numerous policy submissions, since 1993, including to:

2.4.1 Parliamentary Committees;

2.4.2 Individual media (e.g. SABC Editorial Policies);

- 2.4.3 IBA and ICASA (e.g. Broadcasters Code of Conduct; SABC Licence Conditions; Elections report; Disability code of conduct)
- 2.5 MMA’s programme areas include the media’s coverage of: children; democracy and governance; HIV and Aids; gender; media freedom and performance; race, xenophobia and ethnicity; policy submissions and other special projects
- 2.6 President Jacob Zuma recently referred to MMA in his closing NGC address: “the independent Media Monitoring Africa organization has also strongly criticized the quality of reporting in the media and has produced a useful analysis of this subject, while stating that they disagree with the ANC position. The media would do well to read the MMA report.” MMA recommends that this submission be read in conjunction with this state of the media report, which may be found in Appendix A, or at: http://www.mediamonitoringafrika.org/images/uploads/State_of_Media.pdf.
- 2.7 MMA approaches all media policy and regulation within a human rights-based and public interest framework. Within this framework, MMA understands the importance of print media and its regulation and effectiveness not only to democracy, but also to realising citizens’ Constitutional rights to receive and impart information and the right to freedom of the press. Print media and the Press Council is a core component of the media environment in South Africa. Therefore their effectiveness, in entrenching South Africa’s democracy cannot be underestimated.

3. Introduction to MMA’s submission

Values and concepts underlying MMA’s submission

- 3.1 Clause 1.2 of the Press Council’s Constitution sets out one of its aims and objectives as being:

To promote and to develop excellence in journalistic practice and ethics and to promote the adoption of and adherence to those standards of practice and ethics by publications that are

associated with it.

- 3.2 It is with this objective in mind that MMA's submission seeks to constructively contribute to the improvement of journalistic practice, ethics as well as excellence, and therefore responsible and accountable reporting in South Africa that is not hindered by the suppression of media freedom and the free flow of information.
- 3.3 While it is recognised that the Press Council is a voluntary, self-regulatory body, these submissions are informed by the view that such self-regulation should be undertaken with an emphasis on the values underlying the South African Constitution. This is important both as a matter of principle and for reasons of practicality:
- 3.3.1 In principle, the values of the Constitution represent the foundation of the social contract by which the citizens of South Africa have chosen to regulate their affairs. These values regulate not only the political relationship between the state and its subjects but, as the Constitution itself makes clear, also relationships amongst subjects, including those between individuals and corporations such as media outlets. Of particular importance in this regard is the principle that, like all rights in the Constitution, the right to freedom of expression is not absolute and that it must be appropriately balanced with other Constitutional rights.
- 3.3.2 From a practical perspective, the infusion of the self-regulatory system by Constitutional values is important because, by definition, self-regulation takes place outside of the ordinary legal infrastructure provided by the courts which are bound to apply such values in reaching their decisions. Should a significant number of potential "users" of the Press Council's self-regulatory system, or an important group of such users (such as the Government) form the view that it fails to adequately reflect the values of the Constitution, either substantively or procedurally, such users may be discouraged from viewing it as a viable alternative to the ordinary courts as a dispute resolution system.

3.4 More specifically, MMA's submissions are informed by the following key values and concepts:

3.4.1 MMA understands the importance of the print media sector to democracy, and its fundamental role in realising the media's Constitutional right to freedom of the press, as well as citizen's Constitutional right to receive and impart information.

3.4.2 The public interest is supreme in all matters relating to South Africa's media and regulatory systems. This means that the media and its regulation must serve the best interests of the people of South Africa and not only powerful interests in society, such as the government and commercial enterprise. MMA understands this notion of the public interest as requiring that print media content should be diverse and represent and meet the needs of all South African citizens, not just a privileged few, for example those that rank higher on the LSM scale. This is particularly challenging given the following:

The print media is essentially privately-owned and produced for profit. Its role and character is therefore fundamentally different from the bulk of electronic media, which are public media and therefore have a different relationship with their nominal shareholder (Government) than newspapers have with their shareholders (private individuals or institutions). So although the print media essentially has the same responsibilities to society as the electronic media when it comes to issues of fairness, honesty and transparency, its motive remains to make a profit.

As a result, any changes to the regulatory framework will need to avoid – and be seen to avoid – the perception that those involved in the process are purely representing vested interests. It is essential, therefore, that any new self-regulatory framework would need to engender public support and confidence, and be regarded as representing – in a meaningful way – the interests of the broader society in which the media functions, rather than just media owners and/or practitioners.

3.4.3 The print media should meet the needs of all South Africans through diversity of content and issues, for example relating to: gender, children, minority, diversity, HIV/Aids, Aids, sports, culture, employment issues, holding government

to account and acting as a watchdog on behalf of citizens etc.

- 3.4.4 Print media should provide, through its content, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity.
- 3.4.5 There must be measures in place to sufficiently safeguard the regulator's independence in all aspects of its structure and influence, so that it is protected from undue interference from government and the media industry being regulated.
- 3.4.6 The regulator must not be representative solely of the media industry but rather ensure broad representation of all who have an interest in the media. Therefore the appointment process should not allow the media or government to exercise inordinate levels of power, as this could lead to the appointments being purely in favour of "political" or "media" interests rather than in the "public interest".
- 3.4.7 Transparent, open, independent and participatory accountability mechanisms and appointment processes are critical in ensuring that the regulator is transparent to the public, it must not function "haphazardly" and "secretly" with a flagrant disregard for the public interest.
- 3.4.8 Proportionality: Given the significant role of the media in shaping the views and minds of people, regulatory mechanisms and enforcement, including penalties, must be proportional to the harm caused and level of irresponsible journalism.
- 3.4.9 Sufficient funding is fundamental to ensure credible, effective and efficient regulation. An under-funded and under capacitated regulator, leads to ineffectiveness.
- 3.5 The conclusion which flows from these assumptions and core human rights based principles is that the most efficient, fair, ethical, "independent" and cost effective,

print media regulation system would be one that is a more independent self regulation.

- 3.6 This appears to be a combination of two of the types of regulation models which the PFC has specifically asked for comment on.

4. Systems of regulation

4.1 There are a range of models available for regulating the print media. Determining which is the best suited for South Africa, that is in line with the principles noted above (i.e. that meets the highest standards set by our democracy and constitution) cannot be determined by, a negative approach. If there is general unhappiness with the existing system, or if it is perceived to be dominated by particular interests, if there are concerns about limited, or biased coverage, while these may be legitimate concerns it cannot be their negative expression that determine the criteria for a system of print media regulation. Rather, in line with our progressive constitution and democracy, it is imperative that a range of progressive and positive characteristics are used in determining which is the most appropriate model for South Africa. In other words, if there is fault with the existing system, we don't fix it based on what it isn't, but rather on what we want it to be.

4.2 Thus in addition to the assumptions set out in 3 above, MMA believes that the system that should be adopted must satisfy a fine balancing of the following core aspects:

4.2.1 Freedom of Expression: Ensuring and promoting maximum freedom of expression within the limitations contained in the constitution as well as existing legislation;

4.2.2 Accessibility: System must be widely accessible and cost effective to ensure that any person in South Africa, regardless of position, or power can lodge a complaint;

- 4.2.3 Efficiency: It must be efficient in operation. This is to ensure that complaints can be easily and speedily addressed, thus supporting another of the core aspects, of promoting ethical practice;
 - 4.2.4 Fairness and Independence: The system must be fair and be seen to be fair and as independent as reasonably possible, to ensure trust and credibility of the system.
 - 4.2.5 Proportionality and minimisation of Harm: In dealing with violations of the code, action taken are to be proportional to the harm caused, and that rather than punitive action, solutions are aimed at minimising harm.
 - 4.2.6 Development of Journalism: Promotion of best ethical practice, highest standard or journalism and quality media development.
- 4.3 While not exhaustive these core principles can be used to assess the four models that we have been asked to consider.

Model	Principle	Advantages	Disadvantages	Score: out of 6
Statutory-Regulation: Is realised when a regulatory body is either set up by Statute or otherwise controlled by the government. The models of government regulation differ worldwide and are not customised to a set formula hence the level of government involvement differs. For example, the German Press Council is not a statutory body but receives about 30% of its funding from government.	Freedom of Expression	Likelihood of this being violated as result of state interference is extremely high. Evidence of such in neighbouring countries and throughout the world. Except where such state interference is extremely limited as to be meaningless.	Too easy for such a system to be used by any government to limit media freedom and independence and promote propaganda.	0
		State operates nationally, provincially and locally, and thus has appropriate infrastructure for complaints to be submitted by almost anyone	Despite widespread resources of the state, red tape is a common feature of state operations and if such infrastructure is used it would almost certainly violate principle of the Freedom of expression	0.5
	Efficiency;	In developed democracies, state has high levels of efficiencies as well as necessary capacity and resources, thus this might be an advantage. In South Africa however this is not the case	While some state agencies are efficiently operated, insufficient resources, skills and capacity shortages fundamentally undermine this as an option. Further in this model, efficiencies will be undermined by the necessary legal procedures and routes that would be required to be followed for proper administration of justice. Finally there is the issue of cost. In this system extensive public funds would be required to be used to resolve errors within the private sector. Not only would this constitute a poor use of such funds but it is also inappropriate for a developing state such as ours.	0
	Fairness and Independence	May be independent of the media, however global practice indicates where state has control of media fairness and independence suffer	The potential for abuse by factions within state parties is high, and given the media's significant power the possibility of real independence and fairness is fundamentally undermined especially in a developing democracy.	0.5
	Proportionality and minimisation of Harm	None	With close ties to the state in this model, legal processes are likely and there is no indication in global practice of these principles being adopted for this model. Rather evidence as seen in Southern Africa shows punitive and criminal damages are sought.	0
	Development of Journalism	State may choose to fund and develop media schools.	Evidence suggests that state models seek to register and limit voices and diversity, and not encourage these. Further, there are in MMA's view no countries in the world where there is a strong link to the state and quality media. That is, the less free the media the poorer the quality.	0
			Total State Regulation model	1

Model	Principle	Advantages	Disadvantages	Score: out of 6
Co-regulation: Is understood as a combination of government and the media industry regulation. The Indonesia (Dewan Pers translated as "Press Council") example shows features of co-regulation, it is created by Statute Law of the Press 1999 however its funding sources is a mixture of journalists, media owners, assistance from the state and other sources, and its membership consists of media representatives and public figures.	Freedom of Expression	Ideally, where perfect balance of power between government and the media, both could hold the other accountable.	Even in an ideal situation as mentioned, such a system will tend to favour the power elites, of the media and government and not the best interest of the public, and accordingly will almost always limit freedom of expression.	0.5
	Accessibility	If widespread capacity and resources of government are combined with media promoting and advertising it may make the system more accessible.	In a developing state such as ours, with capacity and skills shortages, it is unlikely that such a system would ensure accessibility, rather it would make it more bureaucratic and less accessible	0.5
	Efficiency	Ideally the best of both worlds may be brought to bear in making the system more efficient	Given the different systems that are used, as well as approaches, difficult to see how combining the two would lead to greater efficiency. With more processes required to ensure fairness the system will likely be less efficient and more time consuming.	0
	Fairness and Independence	As noted in 1.1.1 for this model, in an ideal world, it may promote fairness if the powers of media and government are balanced.	in reality power between government and the print media in South Africa is not equal, and thus difficult to conceive how such a model would contribute to fairness and independence	0
	Proportionality and minimisation of Harm	none	With greater bureaucracy and systems required by this model, as well as legal nature such a system is unlikely to minimise harm and adopt a restorative justice approach.	0
	Development of Journalism	In an ideal world, bringing together the media and government would ensure that media development and development of journalists is high on the agenda of both parties.	Requires an operational scenario where power is balanced. If not the advantage mentioned falls away.	0.5
			Total Co-regulation	1.5

Model	Principle	Advantages	Disadvantages	Score: out of 6
Independent Regulation: Implies independence from both the media and government. The Press Council of Ireland embodies qualities of independent regulation, where the Press Council itself and the Press Ombudsman are independent of government, and in operation independent of the media.	Freedom of Expression	In ideal world, because system is independent, freedom of expression is likely to be maximised and promoted.	Over riding question is how independent is independent in this scenario? Depending on selection, formulation appointment etc of the regulator it may not be at all independent hence this principle may be violated	1
	Accessibility:	Potentially very accessible if appropriately funded and resourced.	Who funds the body and how are these systems to ensure accessibility established, and maintained?	0.5
	Efficiency	If staffed by the best qualified and best skilled people it should be more efficient and system should be efficiently run	Funding of the system, and poor judgement by the independent body may limit efficiency, for example by making it too bureaucratic	0.5
	Fairness and Independence	In an ideal world this would be the most fair and independent system.	Requires an operational scenario where power is balanced. If not the advantage mentioned falls away.	1
	Proportionality and minimisation of Harm	In an ideal world system, such a model would regularly consult with the audiences and would therefore take such principles into consideration and be able to implement these.	If the regulator adopts a conservative approach it may seek punitive damages, rather than minimising harm. This would require a clear constitution to prevent such action.	1
	Development of Journalism	If a core aim of the regulator when it is established it may apply pressure to both the media and to government and civil society to develop and build quality journalism.	No guarantees that this will be on the agenda unless it is written into the constitution of this body.	0.5
			Total Independent	4.5

Model	Principle	Advantages	Disadvantages	Score: out of 6	
<p>Self Regulation: Is a peer review system operating within a set of self-imposed rules by the media. It consists of representatives from the media profession passing judgement of complicated matters of journalistic reporting using a Journalistic Code of Ethics which is applied in determining the final ruling, and benchmarking the generally accepted norms and standards. Tanzania has adopted a self-regulatory method for their press. Some self-regulatory systems such as South Africa and UK, include members of the public, in such cases the media representatives dominate in influence and decision making.</p>	Freedom of Expression	Freedom of expression is used and core principle and radically defended	Freedom of expression may be used to justify pursue particular agendas.	1	
	Accessibility	As it is self funded and as it has a material interest in ensuring credibility of the system efforts will be made to ensure it is accessible.	If the system is there merely as window dressing or to combat threats of state interference, it may appear to be accessible, but inadequately funded and resourced.	1	
	Efficiency	Supported by those who work in the industry value resolving complaints quickly and cheaply is well understand this as a means of also ensuring credibility of the system	If the system is there merely as window dressing or to combat threats of state interference it may not be adequately resourced and efficiencies will suffer. Requires pressure from public to ensure on going efficiency.	1	
	Fairness and Independence	In an ideal world where the funding of the self regulatory mechanism has arms length independence from the media owners, this system would likely favour independence and fairness to all sides. Especially if constituted of a diversity of people in the regulator. Further with open transparent appointment processes and balance of processes the system can be fair as well.	Cliques of power within industry, lack of transparency in appointments process as well as lack of independence in terms of funding and appointment will compromise the fairness and independence.	0.5	
	Proportionality and minimisation of Harm	In an ideal world system, such a system would regularly consult with the audiences and would therefore take such principles into consideration and be able to implement these.	If the regulator isn't sufficiently independent, they may opt for minimal penalties and wrist slapping solutions which will undermine the credibility of the system.	1	
	Development of Journalism	In an ideal world the arms length independence will enable the regulator to push for greater quality and the development of journalism.	If the regulator is not sufficiently independent, these issue are unlikely to be high on the agenda as they would cost too much money.	1	
				Total self regulation:	5.5

- 4.4 While the analysis presented above is deliberately brief for ease of access and reading, we submit that their overall scores indicate an accurate view of the merits of each system. MMA would be happy to expand the analysis on each should the PFC so require.
- 4.5 While the current system is clearly not the best, and while it has understandably received some of the criticism levelled, it is clear that with some amendments it could easily be an example of international best practice.
- 4.6 In the following section we outline some of the changes necessary in order to ensure our existing systems would satisfy the criteria set forth in the table above.

5. A faulty system: Shortcomings in the current self regulatory system

- 5.1 It is crucial, if the system is to be successful that existing shortcomings are comprehensively addressed.
- 5.2 While some anecdotal evidence has been presented in media debates, the ANC's Discussion Document contains little evidence to substantiate the ANC's arguments about the existing self-regulatory system. That said, MMA submits that there are currently a number of shortcomings in the Press Council that should be addressed as part of the Commissions process, and which, if addressed, will not only strengthen the existing system but will also ensure that the Press Council is more easily able to fulfil its stated objectives of protecting and promoting freedom of the press as well as excellence in journalistic practices and ethics.
- 5.3 Previously MMA's submission focused on the following aspects,
- 5.3.1 Lack of knowledge both on the part of the general public and in the media itself regarding the Press Code and the operation of the self-regulatory system;

- 5.3.2 Challenges arising out of the self-regulatory nature of the system – the legal enforceability of the decisions of the Ombudsman and the waiver;
- 5.3.3 Independence of the Press Council, including the criteria for appointing the Press Ombudsman, public members of the Council and the absence of an open and transparent appointment process;
- 5.3.4 Lack of clarity in relation to financial arrangements;
- 5.3.5 The relief available to successful complainants;
- 5.3.6 Issues of procedure: ensuring informal, speedy, cost-effective, open and transparent processes; and
- 5.3.7 The absence of overriding principles in the Press Code.

(For detailed analyses of these shortcomings please see Appendix A):

6. Recommendations to address the shortcomings of the current self regulatory system

5.1. Media Monitoring Africa is aware of the amendments made to the Press Code. However areas of concern still need to be addressed. We will still like our recommendations from our previous submission to be looked into (see Appendix A). Below is a summary of our recommendations:

5.1.1 MMA is aware of the efforts lately by both Print Media and Press Council to make ordinary South Africans aware of the Press Code. However, we believe that more can be done by these parties

5.1.2 Our existing code is adequate; however, there are some gaps which if filled would make our code an example of international best practice. In particular there is still

scope for the greater and clearer recognition of the fundamental principles of ethical journalism.

5.1.3 MMA recommends that the Press Code gives context and effect to the concept of *minimising harm* and that it be included as one of the core principles to be taken into consideration in adjudicating complaints. MMA submits that the preamble of the Press Code be amended accordingly to adequately reflect the ethical principle of minimising harm.

5.1.4 MMA is aware and delighted by the changes made to the children's section in the Press Code. However, MMA still feels that the section still lacks a lot of clarity. Accordingly, MMA recommends that, the section on children be modified in the Press Code to deal with the ethical duties of reporting on matters involving children. This will bring the code more in line with the Constitution, and will also demonstrate that media clearly are seeking to protect the most vulnerable groups in society.

1. When reporting on and interviewing any child, the Press shall:

1.1 ensure that the best interests of the child are respected and protected;

1.2 refrain from any conduct which causes the child mental or physical harm or infringes the child's right to human dignity or privacy;

1.3 shall not identify any child by means of an image, the use of the child's name or otherwise where such identification is likely to undermine the child's right to dignity or privacy, without the informed consent of the parent/guardian of the child and, where the child is more than seven years old, the child concerned.

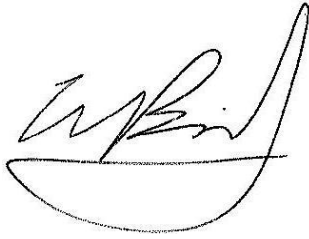
2. In exceptional circumstances and where an overriding public interest demands that the child's identity be disclosed without such consent, the Press may depart from clause 1(c) above.

3. Where obtaining the consent of the child's parent or legal guardian under clause 1(c) above would itself infringe the child's right to privacy and/or dignity, the Press shall refrain from seeking to obtain such consent and the informed consent of the child shall be sufficient."

7. Conclusion

- 7.1 Although MMA supports the maintenance of a self-regulatory system, we have emphasized the importance of ensuring that such a system meets the standards that would promote good journalism and match the standards that journalists expect others to adhere to.
- 7.2 MMA believes that if the changes we have recommended are effected, not only will the Press Council be clearly independent; it will also realize its mandate of being an efficient, cost effective and informal body that addresses complaints against the media.
- 7.3 Finally MMA believes that if the changes recommended are made, the South African Press Council will be an example for developed democracies to follow and South Africa's reputation as being a world leader in innovation and leading human rights development will be enhanced.
- 7.4 MMA thanks the Press Freedom Commission for the opportunity to make this submission, and would welcome an opportunity to present our submission.
- 7.5 Should the proposals contained in this submission be accepted by the Press Freedom Commission or should more detail be required, MMA would be willing to assist in drafting appropriate amendments to the Council's Constitution, the Press Code and the Council's complaints procedures that reflect the changes and address the shortcomings discussed herein.
- 7.6 Please do not hesitate to contact us at the numbers below should there be any queries over our submission, or if we can be of assistance in developing any of the recommendations further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W Bird', with a large, sweeping underline that curves back under the signature.

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Appendix A

Recommendations to address the shortcomings of the current system

Knowledge of the Press Code and the functions of the Press Council

It is our view that all members of the Press Council must carry a standard advertisement for the Press Council, which could include a stated commitment to adherence to the code similar to the BCCSA members' version. MMA submits that should a publication fail to carry the advertisement their membership should, after due process, be terminated from the Council.

Further, MMA recommends that there should be an obligation in the Press Code requiring a plain language version of the press code to be publicised by all member publications. MMA recommends that the Constitution include an obligatory clause for all Press Council members to agree to publish the Press Code as well as give due publicity to the Press Council.

Legal enforceability and Waiver

As discussed above, MMA submits that the Complaints Procedure should be amended to ensure that if a complaint is rejected as contemplated under sections 1.6 and 1.7 of the Complaints Procedure, the waiver can be reversed. To not do so would give credence to the arguments that the waiver is unfair and unreasonable.

Independence

Appointment Panel and Council membership

MMA recommends the amendment of the Press Council Constitution in order to achieve a more representative Appointments Panel that will dilute the dominance of the

current media industry representation. MMA submits that, apart from retaining a judge as the Chairperson, the Appointments Panel should consist of three members appointed as follows:

Parliament representative from the Portfolio Committee for Communications;

A Professor in Journalism; and

A Press Council representative.

This proposal is modelled on the structure of the Judicial Services Commission (which is required by section 178 of the Constitution to include representatives *inter alia* of government, professional and academic) and on principles of democratic theory by recognising that members of parliament best represent the interests of citizens.

Transparent and open appointment process

MMA recommends that the Press Council should be required by its Constitution to adhere to an appointment process characterised by openness, transparency and public participation. MMA therefore proposes that the appointment process should mirror ICASA's appointment process.

This involves a public nomination process, in terms of which suitable candidates are nominated by the public and member publications, a CV is required to be submitted, candidates are short listed and then interviews are conducted openly and transparently in Parliament. MMA proposes that the suitable candidates for the Press Council be interviewed at public hearings, where full transparency is achieved.

MMA further proposes that the Press Council Constitution make provision for the swearing of an oath by its members of Council to uphold the fundamental principles of the Press Code, including the principles of dignity, quality, excellence in journalistic practices, freedom of expression as well as the non-

tolerance of hatred based on race, ethnicity, gender or religion etc.

Financial arrangements

The level of public and journalistic awareness of the Press Council and Press Code are in direct proportion to the amount of resources available for this awareness. Lack of resources will undermine the effectiveness of a regulatory system. Resources are needed to host workshops with journalists and to implement general public awareness mechanisms and strategies.

MMA recommends the adoption of amendments to the Constitution of the Press Council to ensure that it is appropriately funded; its independence safeguarded and it is able to carry out its tasks and mandate without any fear of undue influence from the media industry or any other party.

In addition, MMA recommends that there should be provision to allow the Ombudsman to refer budgetary matters for arbitration at the cost of the Press Council, which will create a vital level of independence for the Ombudsman.

The relief available to complainants

MMA recommends that the Complaints Procedure should be amended to ensure the adoption of a restorative justice approach to the relief that may be ordered by the Ombudsman and Appeals Panel. MMA understands restorative justice to be aptly described in the following extracts:

“Restorative justice” is sometimes used narrowly to refer to programs that bring affected parties together to agree on how to respond to crime (this might be called the encounter conception of restorative justice). It is used more broadly by others to refer to a theory of reparation and prevention that would influence all criminal justice (the reparative conception). Finally, it is used most broadly to refer to a belief that the preferred response to all conflict – indeed to all of life – is peacebuilding through dialogue and agreement of the parties (the transformative conception). [Johnstone and Van Ness]

Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by unjust behaviour. Restoration is best accomplished through inclusive and cooperative processes.” [www.rjcity.org/the-city/.../definition-of-restorative-justice/]

It is submitted that the adoption of a restorative justice approach raises a clear need for other forms of redress to be included in the Complaints Procedure in line with these principles, in terms of which the harm caused can be meaningfully addressed. Alternatives could include other gestures from the media in correcting their actions, for example if a child's rights are violated in the media, the media might be required to contribute towards the child's education or protection or other immediate needs. In the case of a politician who has been clearly harmed due to a violation of the code, the publication could give coverage to the politician in another area by doing a profile. Not would this present the Ombudsman with a range of creative ways of addressing the harm, it would also go some way in building and repairing relationships and promoting social cohesion.

MMA recommends that penalties should be structured in such a way as to allow for the imposition of some form of compensation to the victim for harm caused.

MMA also strongly recommends that the Constitution should oblige employers to include a contractual term in journalists' contracts of employment requiring them to abide by the provisions of the Press Code. This will allow for the taking of disciplinary action against such journalists in cases where violations of the Code take place to ensure that the journalist learns from the violation and is afforded an opportunity to redeem themselves while still contributing to excellent journalism. By making the Press Code part of the standard conditions of employment it would also help encourage greater adherence to the Press code, greater awareness of its provisions, and more responsible reporting.

In general, and most importantly, MMA submits that penalties should be expressly required by the Complaints Procedures to be determined with reference to the principle of proportionality. Where apologies are ordered, it should be obligatory that they include a correction, retraction and explanation. The nature of this penalty should be based on the following criteria:

Proportionality, for example did the story appear as the leading front page story;

The nature of the infringement; and

Past violations.

Ensuring informal, speedy, cost-effective and transparent processes

The MMA's primary concerns focus on ensuring an open, transparent and accessible process that works to support the Press Council's stated intention of providing a speedy, cost effective and informal process for complaints resolution. MMA makes the following recommendations in this regard.

MMA recommends that legal representation only be allowed at the stage of the appeal. Until that point no party may be legally represented.

MMA recommends that an additional step be introduced into the complaints procedure which ensures that, where a complainant requests it, and/or where the basis for a complaint has not been clearly formulated within the boundaries of the code, that an official from the Ombudsman's Office is tasked with assisting complainants to formulate their complaints.

Finally, in order to further reduce costs, and while to the best of our knowledge no costs have been awarded in cases, MMA recommends that a costs clause be included in the Complaints Procedure. Such a clause should stipulate that each party covers its own costs and that no costs can be awarded in a ruling except in exceptional circumstances. Not only would this help discourage costly legal representation (to the extent that it is not excluded altogether), it would also help ensure that potential complainants would not be discouraged from submitting complaints on the fear that costs could be awarded against them.

Strengthening the Press Code- The absence of overriding principles

Overall framing of the Press Code

MMA recommends that the Press Code be amended to make specific reference to the founding values of the South African Constitution, including the values of

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;

(b) Non-racialism and non-sexism

MMA further submits that the preamble of the Press Code make specific reference to the following guidelines of ethical reporting (they are taken from Bob Steele (1-3) from the Poynter Institute and Franz Kruger (4))

Seek Truth and Report it as Fully as Possible

- *Inform yourself continuously so you in turn can inform, engage, and educate the public in a clear and compelling way on significant issues.*
- *Be honest, fair, and courageous in gathering, reporting, and interpreting accurate information.*
- *Give voice to the voiceless.*
- *Hold the powerful accountable.*

Act Independently

- *Guard vigorously the essential stewardship role a free press plays in an open society.*
- *Seek out and disseminate competing perspectives without being unduly influenced by those who would use their power or position counter to the public interest.*
- *Remain free of associations and activities that may compromise your integrity or damage your credibility.*
- *Recognize that good ethical decisions require individual responsibility enriched by collaborative efforts.*

Minimize Harm

- *Be compassionate for those affected by your actions.*
- *Treat sources, subjects, and colleagues as human beings deserving of respect, not merely as means to your journalistic ends.*
- *Recognize that gathering and reporting information may cause harm or discomfort, but balance those negatives by choosing alternatives that maximize your goal of truth-telling.*

Accountability

- *Journalists should be prepared to explain and answer for their work*
- *Cooperation with self regulatory bodies*

Minimising Harm

MMA recommends that the Press Code gives context and effect to the concept of minimising harm and that it be included as one of the core principles to be taken into

consideration in adjudicating complaints. MMA submits that the preamble of the Press Code be amended accordingly to adequately reflect the ethical principle of minimising harm.

MMA also recommends that clause 1.10 also be amended to include the term “minimise harm.”

Children

MMA has sought legal advice on the viability, necessity and constitutionality of a clause of the Press Code focused on ensuring the best interest of the child are upheld.

Accordingly, MMA recommends that a section on children be included in the Press Code to deal with the ethical duties of reporting on matters involving children. This will bring the code more in line with the Constitution, and will also demonstrate that media clearly are seeking to protect the most vulnerable groups in society.

1. When reporting on and interviewing any child, the Press shall:

- 1.1 ensure that the best interests of the child are respected and protected;*
- 1.2 refrain from any conduct which causes the child mental or physical harm or infringes the child's right to human dignity or privacy;*
- 1.3 shall not identify any child by means of an image, the use of the child's name or otherwise where such identification is likely to undermine the child's right to dignity or privacy, without the informed consent of the parent/guardian of the child and, where the child is more than seven years old, the child concerned.*

2. In exceptional circumstances and where an overriding public interest demands that the child's identity be disclosed without such consent, the Press may depart from clause 1(c) above.

3. Where obtaining the consent of the child's parent or legal guardian under clause 1(c) above would itself infringe the child's right to privacy and/or dignity, the Press shall refrain from seeking to obtain such consent and the informed consent of the child shall be sufficient.”

In addition, MMA recommends that the Press Code should expressly (and apart from clause 1.8) include an absolute prohibition on the identification of child victims (for example rape) and child witnesses of crime. Accordingly MMA recommends that the clause is amended to read:

“1.8 The identity of rape victims and victims of sexual violence shall not be published without the consent of the victim, save that the identity of a child shall never be disclosed.”

Public Interest

While it would be inappropriate to provide a definition of public interest, it would certainly benefit and help strengthen good journalism if it is to be clear that the public interest is different to what is of “interest to the public”. MMA recommends that the Preamble of the Press Code include the notion that “what is of interest of to the public, is not necessarily in the public interest”:

The principle already has a significant legal precedence as outlined below.

'(1) There is a wide difference between what is interesting to the public J and what it is in the public interest to make known . . .

(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest. . . .'

[per Lord Griffiths in *Lion Laboratories Ltd v Evans and Others* [1984] 2 All ER 417 (CA), paraphrased by Corbett CJ in *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) at 464C]

Payment for articles and “brown envelope” journalism

MMA recommends that the clause on payment for articles is amended to reduce confusion.

MMA recommends that the prohibition on payment should be applicable to all journalistic pieces and not simply Feature articles. Further MMA recommends that the scope of the clause is also amended to ensure that it is not so broad as to be virtually meaningless, but also not so narrow that it will have no application.

MMA further recommends that a new clause is drafted that can address payment of journalists which seeks to prohibit “brown envelope journalism”.